Supreme Court of the United States,

OCTOBER TERM, 1900.

THE HOMER RAMSDELL TRANSPORTATION COMPANY, *Plaintiff in error,* *against* LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE, *Defendant in error.*	*No. 166.*

CERTIFICATE OF DIVISION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Statement.

This is an action at common law against the Compagnie Générale Transatlantique, a French corporation operating a line of steamships between New York and Havre, and the owner of the steamship *La Bretagne*, for damages caused to the Pier No. 24, North River, in New York harbor, occupied by the plaintiff in error, under the following circumstances:

La Bretagne was lying at her dock No. 42 North River on the 10th of December, 1892. About five

minutes after 8 o'clock in the morning, the tide being about the last of the ebb, *La Bretagne* was backed out of her slip in order to start on her voyage to Havre. She was in charge of a Sandy Hook pilot, licensed under the laws of the State of New York. The tide being ebb, her wheel was put hard-a-port, and she was backed toward the west side of the river as far as it is usual or safe to bring her. A tug was employed to push her stern up-stream, and her engines were started full speed ahead. She began to turn down the river, but when she had reached about the middle of the river it was observed by the master and pilot, who were together on the bridge, that she had ceased to turn. The master and pilot were in consultation and the master suggested that it might be better to stop her. The pilot, however, thought that she had still room to turn in the river, and did not immediately give the order to slow or stop; but after she had run a short distance further he gave the necessary orders to slow, stop and back at full speed, yet in spite of these precautions she ran into the plaintiff's pier, striking it with her bow at an angle of 45 degrees, some 20 feet or more from the end on the north side, and inflicted considerable damage, for the recovery of which this suit was brought.

The case was commenced originally in the Supreme Court of New York and subsequently removed into the United States Circuit Court for the Southern District of that State. After issue was joined the case was, by consent, referred to the Hon. William G. Choate, formerly Judge of the District Court of the United States for the Southern Dis-

trict of New York, and since that time not only one of the most distinguished and able members of the bar of the City of New York, but an eminent jurist of national repute. The learned referee was "appointed to hear and determine all the issues in the said action."

Record, fols. 2, and 22.

The learned referee in an opinion (which is reported in 63 Fed. Reporter, 848, and will be found in the Record, commencing at page 12), after an exhaustive examination of the case and a thorough review of the authorities, came to the conclusion that, as no negligence had been established against the master or any officer or other servant of the defendant, and as the damage was caused solely by the negligence of the pilot, and as the pilot was not appointed or selected by the owner of the steamship, but was imposed by compulsion upon the latter by the laws of New York, there could be no recovery against the shipowner in an action at common law, where the responsibility rests upon the relation of master and servant, although it was conceded that, had suit been brought *in rem* in the Admiralty for damages inflicted on the water, a recovery might be had under the rules of the maritime law against the ship, as was held by this Court in the case of the *China* (7 Wall., 53). This damage, however, being inflicted not on the water but on the land, the Court of Admiralty could not have taken jurisdiction, and plaintiff's only remedy was at common law. (See the *Plymouth*, 3 Wall., 20).

The referee, in accordance with the practice in such cases, separately found the facts and stated his conclusion of law, and upon the filing of his findings and report, together with his opinion, a motion was made by the defendant for the judgment of the Circuit Court, dismissing the complaint, with costs, in accordance with the decision of the referee.

Pending this motion the plaintiff moved for a new trial upon a case and exceptions, which motion was thereafter denied, and a judgment of the Circuit Court was subsequently entered pursuant to the opinion and decision of the referee.

The plaintiff thereafter sued out a writ of error from the Circuit Court of Appeals for the Second Circuit, and upon the hearing of the case in the latter Court the Judges certified to this Court for its instruction the following questions:

> "*First.*—Whether the provisions of Chapter 467 of the Laws of New York passed June 28, 1853, as amended by Chapter 196 of the Laws of said State passed April 11, 1854; Chapter 243 of the Laws of the said State passed April 3d, 1857; Chapter 930 of the Laws of the said State passed May 16, 1867, and Chapter 548 of the Laws of said State passed May 2, 1870, and consolidated into sections 2093 to 2123, inclusive of Chapter 410 of the Laws of said State passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York Court of Appeals."
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> "*Second.*—Whether, in an action at common law, the ship-owner is liable for injuries

inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily."

Summary of Points.

In the presentation of this case in behalf of the defendant in error the following propositions will be insisted upon:

(1). That both questions certified are foreclosed against the plaintiff in error by prior decisions of this Court, and, therefore, should have been ruled by the Circuit Court of Appeals in favor of the defendant in error and not certified to this Court.

(2). That the first question certified, namely, as to whether the New York statutes impose compulsory pilotage, was not before the Circuit Court of Appeals, and, therefore, cannot be properly certified to this Court, inasmuch as that question was a question of fact found by the referee, and not a conclusion of law.

(3). That the distinction in the separate classification of findings of fact and conclusions of law for the purposes of review in an appellate tribunal are substantial and important, and that this distinction cannot be disregarded in the re-examination of cases like the present; and, therefore, this Court is bound, by its rulings in previous cases, to treat the finding of the referee that the New York statute was compulsory, as one of fact and not one of law.

(4). That the objection that the first question certified does not arise in this case is not only supported by the ruling of this Court laid down in the

adjudged cases, but is especially in harmony with the restrictions and limitations imposed upon the review of cases tried by referees.

(5). That, aside from the foregoing reasons, the first question certified is foreclosed on its merits in this Court by the decision in the case of the *China* (7 Wall., 53), which distinctly holds that the New York statute in reference to pilotage is compulsory.

(6). That the decisions of the New York Court of Appeals referred to in the first question certified, and cited by the counsel for the plaintiff in error, do not furnish the rule of decision in this case, and even if so, they are not at all inconsistent with the conclusion of this Court in the case of the *China* (*supra*), that the New York statutes do impose compulsory pilotage.

(7). That independently of the decision of this Court in the case of the *China*, the New York Pilot statutes are compulsory on general principles.

(8). That the New York statutes impose compulsory pilotage on foreign vessels outward bound as well as those inward bound.

(9). That the second question certified is foreclosed as far as this Court is concerned by the recent decision in the case of Ralli *v.* Troop (157 U. S., 386), where this Court said that, notwithstanding its decision in the case of the *China* (7 Wall., 53), to the effect that a vessel would be liable *in rem* in a case of compulsory pilotage, the shipowner nevertheless would not be so liable in an action at common law.

(10). That in considering the second question certified, namely, as to whether the shipowner is liable for

the negligence of a compulsory pilot, the Court, if it should examine the case upon the previous authorities, should, in analyzing the precedents, be guided by a careful discrimination of the classes into which they respectively group themselves, and especially the cases where pilotage has been adjudged to be *compulsory*, and other cases where it has *not* been so regarded.

(11). That the rules of the common law are different in many respects from the rules of the maritime law as administered by the Courts of Admiralty, and, therefore, the rule that a vessel is liable *in rem* for the negligence of a compulsory pilot furnishes no ground whatever for the liability of the shipowner in an action at common law.

(12). That a shipowner is not in any case liable in an action at common law for the negligence of a compulsory pilot, and that the English statute expressly exempting the shipowner from liability in such cases is only *an affirmation of the rule at common law*, which, in that class of cases, would be applied independently of the statute.

(13). That the rule exempting the shipowner from liability for the negligence of a compulsory pilot in an action at common law rests upon the fundamental doctrine of that system of jurisprudence that, in order to constitute the relation of master and servant and to found thereon the rule of *respondeat superior*, the servant must not only be *employed* by, but be under the general *control and direction* of, the master.

(14). That an analysis of the precedents shows that there can be no recovery against a ship-

owner in cases of compulsory pilotage, not only in actions at common law, but in suits *in personam* in the admiralty.

(15). That the American decisions when carefully examined will be found to be in entire harmony with the English authorities upon the questions presented in this case.

(16). That in addition to the fact that the American and English authorities are in harmony with each other when properly analyzed, many of the English cases which were cited in the American decisions and which furnished the bases for *dicta* which has caused the apparent confusion in the cases, have been overruled or reversed on appeal.

(17). That the dictum of this Court in the case of the *China* to the effect that a shipowner would also be liable *in personam*, rested upon cases since overruled or reversed, and as this dictum was not necessary to the decision of that case, it is one of those general expressions which this Court has often declared it would not be bound by in a subsequent examination of the question where the particular point arose.

(18). That the authoritative text writers in this country uphold the doctrine that the shipowner is not liable in an action at common law for the negligence of a compulsory pilot.

(19). That there is neither principle nor authority of law, nor is there any fair and equitable consideration upon which liability should be imposed upon the shipowner in this case.

(20). That, for the foregoing reasons, this Court should direct the return of the first question certi-

fied as not being properly before the Circuit Court of Appeals, or that it should be answered in the affirmative; and as to the second question the answer should be in the negative.

BRIEF OF ARGUMENT IN BEHALF OF DEFENDANT IN ERROR.

First.

Both the questions certified are foreclosed against the plaintiff in error by prior decisions of this Court, and, therefore, should have been ruled by the Circuit Court of Appeals in favor of the defendant in error, and not certified to this Court.

This Court held in the case of the *China*, 7 Wall., 53, that the New York statutes impose a system of compulsory pilotage. It further held in that case that, though the statute was compulsory, the *ship*, considered as the offending thing, was liable *in rem* in the Admiralty. But in the subsequent case of Ralli *v.* Troop, 157 U. S., 386, this Court also held that the case of the *China* was to be considered as limited to suits *in rem* in the Admiralty, and, furthermore, that at common law, where the liability of the shipowner rested upon the relation of master and servant, there could be no recovery against the shipowner for the negligence of a com-

pulsory pilot on the ground that the relation of master and servant did not exist.

This Court has also held in the case of Burgess *v.* Seligman, 107 U. S., 20, and in other cases hereinafter cited, that it will exercise an independent jurisdiction in the construction of State statutes in cases of controversies between citizens of different States; and also that where there is no prior decision of the highest court of a State construing the State statute at the time such construction becomes necessary by this Court, it will not afterwards change its decision, because the highest court of the State subsequently construes the statute differently. Diversity of citizenship, and the fact that at the time the case of the *China* was decided there was no decision of the New York courts construing the statute—(and in fact there is no such decision even now—), make the case of Burgess *v.* Seligman point edly applicable and decisive.

Therefore, this Court having held in the case of the *China* (*supra*) that the New York statute imposes compulsory pilotage; and having held in the case of Ralli *v.* Troop (*supra*) that at common law the shipowner is not liable for the negligence of a compulsory pilot; and having further held in the case of Burgess *v.* Seligman (*supra*), and by other decisions, that, in cases like the present, it will not be governed by the construction of a State statute by the courts of the State, it not only becomes immaterial to enquire into the decisions of the State courts—(which, by the way, will be shown not to differ at all—), but it will be seen at once that both questions certified are fully covered by the prior decisions of this Court.

Second.

The first question certified not being before the Circuit Court of Appeals does not arise upon this record, and is, therefore, not properly certified.

The first question certified is, as before stated, as follows:

> "*First.*—Whether the provisions of Chapter 467 of the Laws of New York, passed June 28, 1853, as amended by Chapter 196 of the Laws of said State, passed April 11, 1854; Chapter 243 of the Laws of the said State, passed April 3d, 1857; Chapter 930 of the laws of the said State, passed May 16, 1867, and Chapter 548 of the Laws of said State, passed May 2, 1870, and consolidated into sections 2093 to 2123, inclusive, of Chapter 410 of the Laws of said State, passed July 1, 1882, impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by way of Sandy Hook, in view of the decisions of the New York Court of Appeals."

This question was not properly before the Circuit Court of Appeals, and, therefore, it is respectfully submitted, will not be considered by this Court on certificate of division.

This being, as before stated, an action at common law which was referred to a referee to hear and determine all the issues therein, is governed by the rule, firmly established, that in such cases the only question before an appellate court is whether the facts found by the referee sustain the

judgment, and that the court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested.

Shipman v. Straitsville Mining Co., 158 U. S., 356;

Roberts *v.* Benjamin, 124 U. S., 64;

Boogher *v.* Insurance Co., 103 U. S., 90;

Bond *v.* Dustin, 112 U. S., 604;

Paine *v.* Central Vermont Railroad Co., 118 U. S., 152;

Andes *v.* Slauson, 130 U. S., 435.

In other words, as was stated in the case of Roberts *v.* Benjamin, 124 U. S., 64 (*supra*), the only questions open to review are whether there was any error of law in the judgment rendered by the circuit court upon the facts found by the referee. The judgment having been entered pursuant to the report of the referee, the facts found by him are conclusive in this Court.

Citing:

Thornton *v.* Carson, 11 U. S., 7 Cranch, 596, 601;

Alexandria Canal Co. *v.* Swann, 46 U. S., 5 How., 83;

York and Cr. R. Co. *v.* Myers, 59 U. S., 18 How., 246;

Heckers. *v.* Fowler, 69 U. S., 2 Wall., 123;

Bond *v.* Dustin, 112 U. S., 604, 606, 607;

Paine *v.* Central Vermont R. R. Co., 118 U. S., 152, 158.

The referee has found distinctly as findings of fact (*a*) that the pilot in question was a duly licensed pilot under and pursuant to the laws of the State of New York; (*b*) that the steamer was navigated under his direction up to the time of the collision; (*c*) that all his orders were promptly and efficiently carried out by the master, officers and crew of the steamship; (*d*) that the pilot was not appointed by the owner of the said vessel nor the master thereof; (*e*) that the owner and master were required and compelled by the law of the State of New York to accept said pilot and allow him to take charge of the navigation of the vessel; (*f*) that the collision and damage resulting therefrom were caused solely by the negligence and want of skill and care on the part of the pilot; and (*g*) that the accident was not caused by any want of skill or negligence on the part of the master, other officers and crew of the steamship.

Upon these findings, the only conclusion of law stated by the referee is that the defendant is entitled to judgment dismissing the complaint upon the merits, with costs to the defendant to be taxed.

See Record, p. 11.

Applying the rule just stated to the Circuit Court of Appeals—(and its application to that Court as an appellate tribunal erected to take the place of this Court in the cases within its jurisdiction cannot for a moment be denied—) it would seem to be obvious that the first question certified was not before that Court and, therefore, could not be certified to this Court for its instruction and decision.

If the plaintiff in error had been dissatisfied with

these findings of fact and had insisted that any of them involved a question of law, as counsel on this hearing now argues, it was incumbent upon the plaintiff in error to move before the referee for a change of his findings. No such motion having been made, it is assumed, of course, that the plaintiff in error acquiesced in them as embodying the referee's decision, and that the findings must stand as they are separately stated as findings of fact and conclusion of law.

The counsel for the plaintiff in error in his brief (p. 29) states that the Circuit Court of Appeals held that the construction of the New York Statute was in reality a question of law and not of fact and that the conclusions of the referee as to the effect of the Statute will, therefore, be reviewed in that Court.

It is sufficient to say that no such ruling appears in the record, and counsel is absolutely in error in making that statement.

Third.

The distinction in the separate classification of findings of fact and conclusions of law for the purposes of review in an appellate tribunal are substantial and important, and this distinction cannot be disregarded in the re-examination of cases like the present.

The first question certified, it will be observed, is but a part of the referee's 13th finding of fact which was as follows:

"*Thirteenth.*—The said pilot was not appointed by the owner of said vessel, nor by the master thereof, but the said owner and master were required and compelled by the law of the State of New York to take said pilot and to allow him to take charge of the navigation of said vessel."

It is manifest from a reading of this finding that the question certified is only a portion of the referee's finding of fact relative to the selection or appointment of the pilot. And, aside from the question as to whether a part of a finding may be extracted from the other parts and made the subject of review, it is plain that the certification of this question, and the submission of it to this Court as a question of law, is an effort to evade the established rule which has been just adverted to, and to impose upon this Court and upon the Circuit Court of Appeals the duty of reviewing a question which, according to established practice, will not be considered.

In other words, to apply the decision of this Court in the case of the Sun Mutual Insurance Co. *v.* Ocean Insurance Co. (107 U. S., 485), where, under the act of February 16th, 1875 (18 Stat. at L., 315), the Circuit Courts in the cases to which the Act referred were required to separately state their findings of fact and conclusions of law, the real question here presented is *not whether the question certified is sound as a conclusion of law, but whether upon that finding as a finding of fact the conclusion of law stated by the referee is correct.*

In that case Mr. Justice Matthews, in delivering the opinion of this Court, said:

> "The facts, *as found and stated* by the court below, *are conclusive*. The case stands here precisely as though they had been found by the verdict of a jury. Or, as it was put in the case of the *Annie Lindsley* (*supra*): 'The question, and the only question, which we can consider is, whether the facts found support the conclusions of law and the decree.' The findings of fact being in the nature of a special verdict, we can go neither behind them nor beyond them. We cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference."
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In the case of the Sun Insurance Co. *v.* Ocean Insurance Co., just referred to, there were separate findings of fact and one conclusion of law, and this Court held, in substance, that the conclusion of law stated, although it might be true as a finding of fact, yet, having been stated as a conclusion of law, it would be *so regarded by this Court* and disposed of as such with reference to the findings of fact.

The question in that case was the liability of the defendant upon a contract of reinsurance; and the Court said:

> "It was essential to the establishment of the libellant's right of recovery, to show that the risk insured against by the policy sued on was the same which the libellant was adjudged liable for on its policy to Melcher. The policy of the respondent in this suit, although, in substance, a reinsurance, was not so in form. It did not describe the risk by reference to the policy of The Ocean Company, so that the identity between the two

could be ascertained by mere comparison. It did not, in fact, allude to any such policy. The risk is described solely by words descriptive of the property insured, without a definition of the interest of the assured. It became necessary, therefore, to aver the identity of the two insurances. This the libel does. But as it is denied in the answer, it became necessary to prove it. The finding of facts, however, in the Circuit Court, does not assert it. It contains other facts bearing on the question. But the conclusion itself is stated, not as a fact, but as a conclusion of law from the facts found, the facts and the conclusions of law having been separately stated, as expressly required by the Act of Congress. The first conclusion of law, in the statement made by the Circuit Court, is that 'The Sun Company's policy covers the Rotterdam charter."

"The question, therefore, presented to us on this appeal is, *not whether that might be true as a conclusion of fact from the circumstances stated in the findings of fact, but whether, upon the facts found, it must be true as matter of law.*"

Applying the ruling thus stated, *mutatis mutandis*, to the question now presented, it is obvious, we think, that the first question certified by the Circuit Court of Appeals does not arise upon the record in this case and should not be considered by this Court.

This ruling, though it arose in another class of cases is equally applicable to the present case; for notwithstanding the decision was made in a case under the Act of 1875 relating to findings of fact and conclusions of law in admiralty cases, the rule is precisely the same in cases

of review of a decision by a referee, viz., that the Appellate Court will only inquire whether the conclusion of law is sound in view of the facts as found; and as there is only one conclusion of law in this case, namely, that the defendant was entitled to judgment dismissing the complaint upon the facts as found, the question certified was not open to the Circuit Court of Appeals for review, and is, therefore, not subject to a certificate of division.

Fourth.

The objection that the first question certified does not arise in this case is not only supported by the rule of this Court just alluded to, but is especially in harmony with the restrictions imposed upon the review of cases tried by referees.

In the case of Hecker *v.* Fowler (2 Wall., 123), Mr. Justice Clifford, in delivering the opinion of Court, went somewhat particularly into the history of the practice of referring cases to referees and the effect of their decisions, and in alluding to the case of the Y. & C. Railroad Company *v.* Myers (18 How., 246), he says:

> "Subordinate tribunal, say the Court, must ascertain the facts upon which the judgment or opinion excepted to is founded,

which undoubtedly is correct for the reason there given, that *this Court cannot determine in cases of common law the weight or effect of evidence, nor decide mixed questions of law and fact.*"

The first question certified by the Circuit Court of Appeals in this case is, if not a pure question of *fact*, certainly but *a mixed question of law and fact*, to take the most extreme view in favor of the plaintiff in error. In other words, the conclusion as to whether the statute of New York was imperative to compel the acceptance of the pilot, rested upon a number of circumstances, among which may be mentioned the fact that the vessel in question was a foreign vessel; that the pilot was a duly licensed pilot; that he spoke the steamer upon her entry into the port under circumstances which called for his services as pilot; whether the commander of the steamer voluntarily accepted him, independently of his quality as a licensed pilot or not, etc., etc.; and had the case been tried by a jury, all these facts and circumstances would have called for the submission of the question as to compulsory pilotage to the jury under instructions of the Court. This would undoubtedly have rendered the whole question a simple question of fact, or, at most, a mixed question of law and fact, which, under the decisions just referred to, this Court will not review in any case tried by a referee.

Fifth.

The first question certified is foreclosed on its merits in this Court by the decision in the case of the *China* (7 Wall., 53), which distinctly holds that the New York statute in reference to pilotage is compulsory.

In the case of the *China*, above referred to, this Court held that the statute of New York of April 3d, 1857, and now embodied in Section 2119 of Chap. 410 of the Laws of said State, passed July 1st, 1882, imposes a system of compulsory pilotage.

The Act of 1857, under construction in the case of the *China*, is as follows:

> "All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot; or in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel."
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> Any person not holding a license as pilot under this act, or under the laws of the State of New Jersey, who shall pilot, or offer to pilot, any ship or vessel to or from the port of New York, by the way of Sandy Hook, except

such as are exempt by virtue of this act; or any master or person on board a steam tug or towboat, who shall tow such vessel or vessels without such licensed pilot on board such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of one hundred dollars."

Chap. 243, Laws of New York, 1857, p. 502.

These provisions are now embodied literally in Section 2119 of the Consolidation Act of 1882, as follows:

"Sec. 2119. * * All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot, or in case of refusal to take such pilot, shall himself, owners or consignees, pay the said pilotage as if one had been employed; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel. Any person not holding a license as pilot under this title, or under the laws of the

State of New Jersey, who shall pilot, or offer to pilot, any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this title, or any master or person on board a steam tug or towboat, who shall tow such vessel or vessels, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars or imprisonment not exceeding sixty days; and all persons employing a person to act as pilot not holding a license under this title, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of one hundred dollars."

Chap. 410, Laws of N. Y., 1882, Section 2119.

In construing these provisions this Court, in the case of the *China*, said:

"It is insisted by the appellants that the statute referred to compelled the master of the steamship to take the pilot, and that they are, therefore, not liable for the results of his misconduct."

"British adjudications are relied upon in support of both these propositions. In order to appreciate these authorities, the British Pilot Acts must be understood. They are the 52 George III., Ch. 30; the 6 George IV., Ch. 125; the Shipping Act of the 17 and 18

Victoria, Ch. 104; the Liverpool Pilot Act of 37 George III., Ch. 789, and the Newcastle Pilot Act of the 41 George III., Ch. 86. The first three mentioned contain equivalent provisions. The same remark applies to the latter two. The former all contain a clause to the effect that the 'owner or master of any ship shall not be answerable for any loss or damage occasioned by the neglect, default, incompetency or incapacity of any licensed pilot. The latter contain a system of local pilot regulations, but have no such provision. They require that a pilot shall be taken, and if not taken, the pilotage shall, nevertheless, be paid. In these respects, and in most others, they are substantially the same with the Statute of New York."

"Was the steamship compelled to take the pilot?"

"In the case of the *Maria*, 1 W. Rob., 95, in which the Liverpool Pilot Act was largely considered, Dr. Lushington said: 'It never was decided that a clause requiring a pilot to be taken on board, or if not taken, the pilotage to be paid, was not compulsory. * * * Now, the Liverpool Pilot Act provides for three cases: 1. The case of vessels homeward bound; 2. Of vessels outward bound; and lastly, of vessels lying at anchorage, and with reference to homeward-bound vessels, it is provided in the 24th section of the Act that if the master refuses to take a

pilot on board he is liable to the payment of pilotage. There is, therefore, this distinction in the two cases: That in the case of a vessel at anchor, the taking of the pilot on board is perfectly optional with the master, but in the case of a homeward-bound vessel, it is enjoined upon him by the provisions of the Act, and if he refuses so to do, he is rendered liable to the payment of the pilotage dues. This, in my opinion, amounts to compulsion to take such pilot on board, and it was so held by the learned judges by whom the case of Sidebotham *v.* Caruthers was decided. What says Mr. Justice LeBlanc? It appears that the master was compellable to take the pilot on board, and it was in consequence of his misconduct that the vessel was placed in such a situation that when the water left her she fell upon her side, and thus the damage happened.' Without going further into the case, it is sufficient to observe that Lord Ellenborough and Mr. Justice Bailey were of the same opinion that the master was compellable to take the pilot on board." 1 W. Rob., 95.

"Other authorities to the same effect might be referred to, but it is deemed unnecessary. The one we have cited is sufficient."

"Suppose the New York statute, in the event of a refusal to take a pilot on board, instead of full pilotage, had given the vessel or cargo to the pilot. Whether the amount

to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact, but in the degree of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is that he would have had the same option if the consequence had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined and an obligation is imposed. The alternatives presented are to receive the pilot, or to refuse and take the consequences."

"In this connection it is proper to consider the particular provisions of the New York Statute. It enacts that the master 'shall take a licensed pilot;' that, in case of refusal, pilotage shall be paid, and that it shall be paid to the first pilot offering his services. Any person not holding a license under this Act, or the law of New Jersey, who shall pilot, or offer to pilot, any vessel to or from the port of New York, by way of Sandy Hook, except such as are exempt by virtue of this Act; or any master on board a steamtug who shall tow such vessel without a licensed pilot on board, shall be punished by a fine not exceeding $100, or imprisonment not exceeding sixty days; and all persons employing a

person not licensed under this Act, or the laws of New Jersey, are subjected to a penalty of $100."

"It was contended by the counsel for the appellee, that if the master had chosen to proceed without a pilot, he would have been liable only to the payment of pilotage; and that none of the other penal provisions of the Statute, according to its true meaning, apply in such a case. We have not found it necessary to examine this subject. Giving to the statute either construction, it seems to us clear, in the light of both reason and authority, that *the pilot was taken by the steamship on compulsion.*"

Sixth.

The decisions of the New York Court of Appeals cited by the counsel for the plaintiff in error are not rules of decision in this case, and, even if they furnished the rule of decision, they are not at all inconsistent with the conclusion of this Court in the case of the *China* that the New York statutes imposes compulsory pilotage.

The counsel for the plaintiff in error states in his brief (p. 10) that, since the decision of this Court in

the case of the *China*, the New York pilot law has been examined by the Court of Appeals of the State and that Court has given a construction to it different from that of the learned referee, and differing from that of this Court in so far as the latter assumed that the law required the employment of the first pilot under the penalty of paying pilotage fees to him, thus giving the master no right of selection from the class; and it is insisted that, in the construction of statutes of a State, this Court will follow the decisions of the highest court of the State, and will only form an independent judgment as to the meaning of the State law where there was no binding construction of such State statute by the court of last resort of the State.

The counsel for the plaintiff in error is mistaken, it is respectfully submitted, not only in his statement of the law supposed to govern this Court in the construction of State statutes in cases like the present, but is also in error in his statement that the New York Court of Appeals has put a construction upon the pilotage acts different from that of the Referee in this case any different from that of this Court in the case of the *China*.

(1). The rule is not, as stated by the learned counsel, that in cases like the present this Court will follow the decisions of the highest court of the State, and will only form an independent judgment as to the meaning of the State law where there was no binding construction of such State statute by the court of last resort of the State; but it has been distinctly held by this Court that, in cases of controversy

between citizens of different States—(which, of course, includes controversies between a citizen of a State and foreign States, citizens or subjects)—it will not be bound by the construction put upon the State statute by the highest court of the State.

This ruling was distinctly laid down in the case of Burgess *v.* Seligman (107 U. S., 20); and in the head-note of that case, prepared by Mr. Justice Bradley, who delivered the opinion, as reported in the reports of this Court published by the Lawyers' Co-operative Publishing Co., Book 27, p. 359, the rule is stated by him as follows:

> "The Federal courts have an independent jurisdiction in the administration of State laws in cases *between citizens of different States* co-ordinate with and not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

And in the body of the opinion the learned Justice says:

> "We do not consider ourselves bound to follow the decisions of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with and

not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes."

"Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal court to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the

law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the National courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the margin, but it is not deemed necessary to discuss them in detail."

And as long ago as the December Term of this Court of 1855, Mr. Justice Grier, in delivering the opinion in the case of Pease *v.* Peck, 18 How., 595, said:

> "There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the State courts on the construction of their own laws. But, although this may be a correct, yet a rather strong expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of a State, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under State laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a State court, as in the case of Rowan *v.* Runnels, 5 How., 139. When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions—and much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opin-

ion has elicited new doctrines, subversive of former safe precedent. Cases may exist, also, when a cause is got up in a State court for the very purpose of anticipating our decision of a question known to be pending in this court. Nor do we feel bound in any case in which a point is first raised in the courts of the United States, and has been decided in a circuit court, to reverse that decision contrary to our own convictions, in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State."

"Parties who, by the Constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly, the State tribunal might not be impartial between their own citizens and foreigners."

The rule of this Court, therefore, especially in cases where the parties represent diverse citizenship, as is the case here, is not as stated by the counsel for the plaintiff in error; but on the contrary, the rule is that the prior decisions of this Court construing a State statute, as is the fact in the case of the *China* (*supra*), will not be disturbed,

because the highest court of the State, whose statute was under construction, had subsequently come to a contrary conclusion.

Therefore, the decision of this Court in the case of the *China*, that the New York statutes impose compulsory pilotage, will, under the rule which has just been referred to, be adhered to by this Court, although the New York Court of Appeals may have decided the question differently.

(2). The only cases cited by the counsel for the plaintiff in error which are supposed to put a different construction upon the New York Pilotage Act from that adopted in the case of the *China* and followed by the referee in this case, are Brown *v.* Elwell, 60 N. Y., 249, and Gillespie *v.* Zittlosen, 60 N. Y., 449.

These cases, it will be found upon examination, however, fail to sustain the point upon which the learned counsel relies.

The case of Brown *v.* Elwell (*supra*) was an action to recover pilotage fees by a pilot duly licensed under the laws of New Jersey, and the only question decided by the Court of Appeals was that a pilot licensed under the laws of New Jersey was a licensed pilot within the meaning of the New York statute, and was, therefore, entitled to recover his pilotage fees. Certainly this decision does not hold that the New York statute is not compulsory.

The only other case cited is Gillespie *v.* Zittlosen, 60 N. Y., p. 449. That was also an action by a pilot who first offered his services, and who was

refused, to recover his pilotage fees; and the decision was that, whilst the shipmaster might refuse the pilot, he was nevertheless liable to pay fees to the first pilot offering his services. Certainly, also, this decision does not hold that the Pilotage Act is not compulsory.

By the term "compulsory" it is not to be understood that a shipmaster may not, if he so elects, absolutely refuse a pilot; for this he may do in any case, subject to the penalties of such refusal. In other words, any one may violate the law if he chooses to do so and take the consequences. This, however, it is respectfully submitted, does not make the operation of that law less binding in a legal sense, because it is the duty of every one to obey the law and not to violate it. And those who obey the law are certainly under the stress of its provisions, and when they have submitted to its operation, the true legal meaning and effect of such submission is that of compulsion in obeying it.

(3). In concluding this branch of the case it may, furthermore, be urged that on account of the fact, as will appear from a further examination of this case, that the New York statutes relating to pilotage are derived very largely from similar provisions enacted by the British Parliament, and presumably furnish the basis for the legislation of other States of the Union in regard to pilotage, they really present rather a question of commercial law and general jurisprudence than of local law, as to which under the rule laid down as long ago as the case of Swift *v.* Tyson (41 U. S., 16 Pet. 1), and followed by

numerous decisions of this Court since that time, this Court and all other Federal courts will exercise their independent judgment and decision.

For these reasons, (1) because the controversy here is between a citizen of a State and a foreign citizen; (2) because this Court, in the case of the *China*, construed the New York pilotage statutes as compulsory, when at that time there was no construction as to that question placed upon them by the highest court of the State; (3) because the cases cited by the counsel for the plaintiff in error really do not show that the New York Court of Appeals has come to a different conclusion from this Court as to the effect and meaning of the statute of the State in question; and (4) because the question presented is rather one of commercial law and general jurisprudence than of the construction of a local statute—for these reasons, it is respectfully submitted, there is no ground whatsoever for this Court to change its ruling laid down in the case of the *China*, to the effect that the New York statutes respecting pilotage are compulsory.

Seventh.

Independently of the decision of this Court in the case of the *China*, the New York pilot statute is compulsory on general principles.

It is a misdemeanor, both at common law and by statute, not to comply with such provisions.

It is a principle that when the common law or a statute forbids the doing of a thing—(in this case refusing to take a pilot)—the doing of it is indictable as a misdemeanor.

1 Chitty Crim. L., 239;
2 Hawk C. P , 171;
Rex *v.* Sainsbury, 4 T. R., 457;
Same *v.* Robinson, 2 Burr., 799;
Same *v.* Wigg, 2 Salk., 460;
Same *v.* Carlisle, 3 B. & A., 161;
People *v.* Norton, 7 Barb., 477.

This principle was enacted into the New York Revised Statutes (2 Rev. Stats., 696, sec. 39) and is now in the Penal Code of that State, (Penal Code, sec. 155,) as follows:

> "Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor."

In short, the statute in question is compulsory for three reasons:

1. Because the law requires every vessel from a foreign port to take a licensed pilot, and imposes a penalty for not doing it.

2. Because if a pilot is not taken the underwriters are discharged.

Law *v.* Hollingworth, 3 T. R., 160.

3. Because it is a misdemeanor, and indictable.

N. Y. Penal Code, Sec. 155 (*supra*).

But leaving out of view for the moment any consideration of the penal consequences of the refusal to take a pilot, this Court, in the case of the *China* (*supra*), adopting the view of Dr. Lushington in the case of the *Maria* (1 W. Rob., 95), as we have before seen, said:

> "Suppose the New York statute, in the event of a refusal to take a pilot on board, instead of full pilotage, had given the vessel or cargo to the pilot. Whether the amount to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact, but in the degree of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is that he would have had the same option if the consequences had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined and an obligation is imposed. The alternatives presented are to receive the pilot, or to refuse and take the consequences."

Eighth.

Pilotage was compulsory in this case both inward and outward; but whether pilotage for the outward voyage was expressly compulsory or not is altogether immaterial.

The counsel for the plaintiff in error under his "First Point," at the foot of page 12, devotes much attention to arguing that the New York Statute does not impose compulsory pilotage for the *outward* voyage.

In support of this contention the learned counsel relies upon the provisions of Chap. 930 of the Laws of New York of 1867, Sec. 1, p. 2314, now consolidated with other provisions into Chap. 410 of the Laws of 1882, Sec. 2119. The language of the Act of 1867 and the Consolidation Act of 1882 are in exactly the same words, as follows:

> "Any pilot bringing in a vessel from sea, shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless, in the meantime, a complaint for misconduct or incapacity shall have been made against such pilot, or one of his boat's company, and proved before the Board of Commissioners of Pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said Commissioners may assign any

other pilot in the same pilot boat to pilot said vessel to sea."

Chap. 930, Laws of New York, 1867, Sec. 1, p. 2314;
Chap. 410, Laws of 1882, Sec. 2119, commonly called the "Consolidation Act."

The Court will observe that the New York Act of 1857, and Section 2119 of the Consolidation Act, above set forth, both provide that "all masters of foreign vessels * * * bound *to and from* the Port of New York by way of Sandy Hook shall take a licensed pilot"; and that the Act of 1867, now embodied in Section 2100 of the Consolidation Act just quoted, merely provides that the pilot bringing in the vessel from sea shall by himself, or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless in the meantime a complaint for misconduct or incapacity shall be made against him or one of his boat's company and proved before the Pilot Commissioners; and that the Pilot Commissioners *may* assign any other pilot in the same pilot boat, in case the shipowner shall signify his desire to change the pilot.

Certainly there is no more a *selection* of the pilot by the shipowner in the latter case than in the case of inward pilotage. The selection, if made—and the change can be effected only at the pleasure of the Pilot Commissioners—is that of the Pilot Commissioners and *not* the shipowner.

It would seem, therefore, to be sufficient to dispose of this branch of the argument of the learned counsel for the plaintiff in error to merely refer to the opinion of the learned referee who tried this case.

On that point he says:

> "The provision with regard to outward pilotage is that the pilot who brought in the ship has the right by himself, or one of his boat's company, to take her out unless he has been complained of for misconduct; subject, however, to the right of the shipowner to object to this particular pilot, in which case the Commissioners of Pilots shall assign another pilot, from the same boat's company to take the ship out."
>
> (3 Rev. Stat. 2017, 2019, 2020.)
>
> "If the shipowner were at liberty to select a pilot out of a class of pilots licensed by the State it could not be held that the shipowner was compelled to take the particular pilot employed. But the right to object to one particular pilot, certainly, does not make the appointment of another selected by the Commissioners from the same boat's crew a voluntary appointment by the owner of the vessel of such substituted pilot."
>
> See Record, fols. 26 and 27.

But it is of no consequence, even if true whether outward pilotage is expressly compulsory or not,

although that construction of the statute is denied. The fact that the pilotage was originally compulsory would render it immaterial if, afterward or at the particular point where the collision took place, the pilotage was not compulsory; because it has been decided that the shipowner is exempt from liability in case a compulsory pilot is on board, *although at the spot where the collision occurs there is no compulsion to take a pilot on board.*

Thus a vessel bound to London took a London pilot off Dungeness, where his employment was compulsory. A collision occurred by the pilot's fault on the voyage up the river at a spot within the port of London, but short of the ship's destination. It was held that, even conceding that the ship could not have been compelled to take on board a pilot at the place where the collision occurred, the shipowners were, nevertheless, not liable for the collision. The engagement of the pilot having been in the first instance, compulsory, and the right and duty of the pilot under that engagement being to navigate the ship to her destination, the decision was that the relation of master and servant never arose between the owners and the pilot so as to make the owners liable for the pilot's acts.

General Steam Navigation Company *v.* British and Colonial Steam Navigation Company, L. R. 3, Ex. 330; S. C., affirmed 4 Ex., 238.

See also

The Charlton, 8 Asp. Mar. Law Cas., 29.

Ninth.

The second question certified might, if necessary, be disposed of summarily in favor of the defendant in error by a brief reference to a very recent decision of this Court.

The second question certified is: "Whether, in an action at common law, the shipowner is liable for injuries inflicted exclusively by negligence of a pilot accepted by a vessel compulsorily."

Although the second question presented by this certificate of division will be discussed at length in this brief, it is thought that counsel for the defendant in error might, if necessary, content himself by citing, as foreclosing the same, the recent decision of this Court in the case of Ralli *v.* Troop (157 U. S., 386), in which Mr. Justice Gray, in considering the case of the *China* (7 Wall., 53), in which it was held, as above stated, that the New York statutes impose compulsory pilotage, but that notwithstanding such compulsion a recovery might be had *against the offending vessel*, irrespective of any liability of the owner *in personam*, used this language:

> "The authority of the pilot, as regards general average, was not touched by the decision of this Court in the *China* (7 Wall., 53), by which a vessel, in charge of a pilot whom she had been compelled by law to take

on board, and brought by his negligence into collision with another vessel, was held, upon a libel *in rem*, to be liable in damages to the owners of that vessel. That decision proceeded, *not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo;* nor upon the law of contribution in general average as between them; *but upon a distinct principle of the maritime law, namely, that the vessel in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to the maritime lien for the damages* (7 Wall., 68). As said by Mr. Evarts, in his argument for the libellants: This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the adjustment among the navigators, or between them and the owners of the personal fault or personal responsibility of the misgovernment of the vessel" (7 Wall., 56.)

And Mr. Justice Brown, with whom concurred Mr. Justice Harlan in the same case, whilst dissenting from the other Justices as to the main question decided, nevertheless agreed with the majority of the Court as to the true construction of the decision of this Court in the case of the *China*, and as to the rule of law there laid down. The learned Justice, upon this question, said:

"A case which seems to me to be more closely allied in principle to the one under consideration is that of the *China* (7 Wall., 53), in which this Court held, contrary to the English, but comformably to the continental authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, *although it was admitted that, if the action had been at common law against the owner, and probably also in personam in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner.* The opinion must necessarily rest upon the ground that the vessel is in some sense herself a principal, and any one having lawful command of her is, for the time being, her agent, for whose conduct she is herself responsible, both in contract and in tort. The principle of the case is, that a person who is exercising the authority of a master by operation of law is to be considered as master *pro hac vice*, and as invested with authority as such."

This ruling, unanimously concurred in by all the Justices of this court so recently as the October Term, 1894, and so pointedly and decisively disposing of this question, would seem to be conclusive of this branch of case, and might be relied upon as furnishing a complete and decisive answer to the second question certified.

Tenth.

In considering the second question certified, the Court, in analyzing the precedents, should be guided by a careful discrimination of the classes into which they respectively group themselves.

In considering the second question certified the Court, in examining the authorities, should carefully discriminate the two classes of cases which lay down a different rule of liability in cases of compulsory pilotage from that obtaining in cases where pilotage is not compulsory.

The plaintiff, having brought his action at common law, must be governed by the rules of that system of jurisprudence, whatever may be the rule otherwise in admiralty; and in the consideration of this point the attention of the Court is invited to a few general considerations.

(1). It should be borne in mind, in the first place, that the whole doctrine of responsibility of the master for the servant is a technical one in any case and rests upon the slim basis that where one of two innocent parties is to suffer for an injury inflicted by a servant, the one who has *chosen the servant* is called upon to respond, simply from the fact that he has voluntarily *selected* him.

(2). In the next place, the Court is requested to consider the distinction between the rules of

the common law and the rules of the maritime law, as will be hereinafter pointed out, from which it will appear that the maritime law with respect to many questions constitutes a distinct and separate system of jurisprudence in many respects different from the common law under which this action is brought.

(3). Again, the Court is furthermore requested in the examination of the precedents respecting the liability of a shipowner for the negligence of a pilot, to distinguish between those cases where a pilot has been found to be *compulsory*, and those where the pilot has *not* been found to be compulsory.

Too much stress, it is respectfully submitted, cannot be laid upon this distinction. The omission to keep it in view was the cause of the apparent confusion and contrariety of decision in the English courts for many years, as will appear from an examination of the cases of the *Protector*, 1 Wm. Rob., 55, 56; the *Maria*, 1 Wm. Rob., 105, 107, 108; the *Agricola*, 2 Wm. Rob., 11, 20 and 21; and the *Eden*, 2 Wm. Rob., 442, extracts from which are hereinafter fully set forth. The same omission to keep this distinction in mind has also occasioned a misapprehension of the proper weight as precedents of many of the American cases, which, it will appear upon examination, are really in entire harmony with the British decisions, as will be hereafter shown.

The distinction between cases of voluntary and cases of compulsory pilotage in respect of the re-

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sponsibility of the shipowner is recognized and conceded in the discussion of the cases even by counsel seeking to establish the liability of the shipowner, and notably in the case of General Steam Navigation Company *v.* The British and Colonial Steam Navigation Company, Limited (L. R., 4 Exch. Cas., 238), where Mr. Pollock, Q. C., contending for the responsibility of the shipowner on the ground that the pilot was not compulsory in that case, nevertheless, conceded that the rule of responsibility would be different if the pilotage had been *compulsory.*

Upon that point he said:

> " The owner, as *dominus navis*, is bound to conduct his vessel so as not to do injury to others; he cannot excuse himself on the ground that he has, by a voluntary stipulation, subjected himself to the will of another, the *Ticonderogo* (Swab., 215). He is liable for all acts, whether of the pilot or of the crew, except such as are done by a pilot imposed upon him by statute, the *Diana* (1 Wm. Rob., 131), as was the case in *Bowcher* v. *Noidstrom* (1 Taunt., 568). That this is so, is shewn by the distinction which has always been made in the cases between compulsory and voluntary pilotage, which is an old and well-established one, *Carruthers* v. *Sydebotham* (4 M. and S., 77, at p. 85), *Neptune the Second* (1 Dodson, 467), *Attorney-General* v. *Case* (3 Price, 302), and lastly, the *Maria* (1 Wm. Rob., 95, at p. 99) where

the immunity in the case of compulsory pilotage is placed on general principles. The recent case of the *Halley* (Law Rep., 2 P. C. C., 193) in the Privy Council shews the distinction to be still recognized. The same doctrine is laid down in *Story on Agency*, s. 456a."

Gen. Steam Nav. Co. *v.* British and Col. Steam Nav. Co., L. R., 4 Ex. Cas., 238, 242.

(4). The Court is also requested to bear in mind that the case of the *China*, 7 Wallace, 53, as well as many others upon which the plaintiff in error so confidently relies, rests upon the distinct ground that the action being *in rem* the ship primarily was the offending thing, thus raising a lien which the maritime law impresses upon her and enforcible against the ship, irrespective of the owner.

(5). Another consideration to be taken into account is the liberality of modern legislation and the general trend of judicial decision in favor of restrictions and limitations of the shipowner's liability in cases generally, notably the legislation of the Act of 1851 (9 Stat., 635, Sec. 3; R. S. 4283) exempting the shipowner from all liability beyond his interest in the ship and freight for negligence without his privity or knowledge, which exemption is extended by the Act of June 26, 1884 (23 Stat., 57, Sec. 18) so as to relieve the shipowner from all liability whatsoever beyond such interest, irrespective of his privity or knowledge; and furthermore, by what is known as the "Harter Act" of February 13, 1893 (27 Stats., 445) exempting the shipowner from all

liability upon bills of lading where he is not shown to have failed to exercise due diligence to make his ship seaworthy, and also by the long line of decisions of this Court to the effect that a shipowner is not liable for negligence resulting in death on the high seas (*The Harrisburg*, 119 U. S., p. 199). In other words, the general tendency of legislation and judicial decision being in the line of narrowing the liability of the shipowner for the purpose of encouraging maritime venture, the leaning of the Court in marginal and doubtful cases should be rather to exempt the shipowner than to extend his liability.

6. Another consideration of very vital significance in this case is the fact that the master of the *Bretagne* foresaw the danger and warned the pilot, and had the master's warning been heeded there would have been no collision. Certainly if there ever was a case where this Court should be astute to exempt the shipowner this is one.

It is thought that these considerations and distinctions will materially lighten the labors of the Court in the examination of the second question certified.

Eleventh.

The rules of the common law are different in may respects from the rules of maritime law as administered by Courts of Admiralty.

That there are differences, both in the procedure and in the substantial jurisprudence between the

common law and the maritime law, appears by all the authorities.

These distinctions were adverted to by this Court in Atlee *v.* N. W. Union Packet Co., 21 Wall., 389.

In that case the Court says:

> " But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this Court the course of proceeding is in many respects different *and the rules of decision are different.* The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages."
>
> " In the common law court the defendant must pay all the damages or none. If there has been, on the part of plaintiffs, such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice, as the other; *and the plaintiff who has the selection of the forum in*

which he will litigate cannot complain of the rule of that forum."

"It is not intended to say that the principles which determine the existence of mutual fault on which the damages are divided in admiralty are precisely the same as those which establish contributory negligence at law that would defeat the action. *Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially.*"

So, also, in the case of the *China*, 7 Wall., 53, the same distinction—(which constituted the real point in judgment)—was again affirmed.

In that case the Court said:

"*According to the admirally law the collision impresses upon the wrong-doing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come.* It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. *Unlike a common law lien*, possession is not necessary to its validity. It is rather in the nature of the hypothecation of the civil law. It is not indelible, but may be lost by laches or other circumstances. *The Bold Buccleugh*, 7 Moore, P. C., 284; Edwards *v.* the *Stockton*, Crabbe, 580; the *American*, 16 Law Rep., 264; the *Lion*, Law Rep., Nov., 1868 (Adm. & Eccl.), 102."

The distinction between the jurisprudence of the admiralty and that of the common law is also instructively discussed by Judge Holmes in his work on the "Common Law."

He says (p. 25):

> "I must for the moment leave the common law and take up the doctrines of the Admiralty. In the early books which have just been referred to, and long afterwards, the fact of *motion* is adverted to as of much importance. A maxim of Henry Spigurnel, a judge in the time of Edward I, is reported, that 'where a man is killed by a cart, or by the fall of a house, or in other like manner, and the thing in motion is the cause of the death, it shall be deodand.' (Y. B. 30 and 31, Ed. I, pp. 524, 525; cf. Bract., fol. 136*b*). So it was said in the next reign that '*omne illud quod movet cum eo quod ocidit homines deo dandum domino Regi erit vel feodo clerici.*' (Fitzh. Abr. Corone, pl. 403). The reader sees how motion gives life to the object forfeited."
>
> "The most striking example of this sort is a ship. And accordingly the old books say that, if a man falls from a ship and is drowned, the motion of the ship must be taken to cause the death, and the ship is forfeited—provided, however, that this happens in fresh water. (Bract., 122; 1 Britton (Nich.), top p. 16; Fleta, I., c. 25, § 9, fol. 37). For if the death took place on the high seas, that

was outside the ordinary jurisdiction. This proviso has been supposed to mean that ships at sea were not forfeited (1 Hale, P. C., 423); but there is a long series of petitions to the King in Parliament that such forfeitures may be done away with, which tell a different story (1 Rot. Parl., 372; 2 Rot. Parl., 345, 372 *a*, *b*; 3 Rot. Parl., 94*a*, 120*a*, 121; 4 Rot. Parl., 12 *a*, *b*, 492*b*, 493. But see 1 Hale, P. C., 423). The truth seems to be that the forfeiture took place, but in a different court. A manuscript of the reign of Henry VI, only recently printed, discloses the fact that, if a man was killed or drowned at sea by the motion of the ship, the vessel was forfeited to the admiral upon a proceeding in the admiral's court, and subject to release by favor of the admiral or the king (1 Black Book of the Admiralty, 242)."

"A ship is the most living of inanimate things. Servants sometimes say 'she' of a clock, but every one gives a gender to vessels. And we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty. It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

"By way of seeing what those peculiarities are, take first a case of collision at sea. A collision takes place between two vessels, the *Ticonderoga* and the *Melampus*, through the fault of the *Ticonderoga* alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal liability on elementary principles. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done (Cf. *Ticonderoga*, Swabey, 215, 217), and this means that that vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and wagon. It would be seen that the only property which could be sold to pay for a wrong was the property of the wrongdoer."

"But, again, suppose that the vessel, instead of being under lease, is in charge of a pilot whose employment is made compulsory by the laws of the port which she is just entering. The Supreme Court of the United States holds the ship liable in this instance

also. (*China*, 7 Wall., 53.) The English courts would probably have decided otherwise, and the matter is settled in England by legislation. But there the Court of Appeals, the Privy Council, has been largely composed of common law lawyers, and it has shown a marked tendency to assimilate common-law doctrine. At common law one who could not impose a personal liability on the owner could not bind a particular chattel to answer for a wrong of which it had been the instrument. But our Supreme Court has long recognized that a person may bind a ship, when he could not bind the owners personally, because he was not their agent."

"It may be admitted that, if this doctrine were not supported by an appearance of good sense, it would not have survived. *The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange Courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.*"

Holmes, The Common Law, p. 25.

The learned author further discusses the subject at some length, but the foregoing extract, it is thought, will be sufficient to illustrate the point under consideration.

The distinction between the substantive structure

of the admiralty or maritime law, and the local civil or common law is also illustrated by the very recent case of Workman *v.* New York City, decided at the present term of this Court, and reported in 179 U. S., 552.

In that case this Court held that, in a suit in admiralty there might be a recovery for damages for negligence, although by the law of the State had the action been brought at common law there could have been no recovery.

Workman *v.* N. Y. City, 179 U. S., 552.

A case much more in point, and which, it has been argued, is decisive of the question presented here, is the case of Ralli *v.* Troop, already adverted to, and quoted from, under the ninth point of this brief, where this Court held that the case of the *China* (7 Wall., *supra*) rested upon the distinct ground that in a proceeding *in rem* a vessel was regarded as the offending thing, and was for that reason liable; but that the rule at common law was different, and, therefore, in an action at common law, like the present, there could be no recovery against the shipowner for damages caused exclusively by the negligence of a compulsory pilot.

(See Ralli *v.* Troop, *supra*).

Besides these authorities, many points of difference between the rules of the maritime law and those of the common law may be instanced.

(*a*). In the first place, it may be mentioned that the whole system of hypothecations in admiralty

enforceable by proceedings *in rem* is not recognized at all at common law.

(*b*). So, too, the case of general average contribution may be noted. This is a right utterly unknown to the common law, and a Court of common law could not be resorted to to enforce it. It is true that where goods are released on a general average bond, a Court of common law may enforce the bond, but the right, in that event, is merged into *something else*, *i. e.*, into the bond. In other words, it is the bond and not the right which furnished the consideration of the bond that is recognized at common law, and if no bond were exacted, the right to contribution would receive no recognition at all in a common law Court.

(*c*). So, also, in the case of disputes between the majority and minority shipowners. In that case, if the minority object to an operation or adventure proposed by the majority, the latter may in the admiralty require the majority to give security for the safe return of the ship; but no such right as this is recognized at common law or even in equity.

(*d*). So, also, in the case of contributory negligence referred to by this Court in the case above cited, the plaintiff is not debarred in admiralty from recovering damages, even though he be negligent himself; whereas, at common law, if he is guilty of any negligence whatsoever contributing to the accident, he is utterly debarred from recovery.

It follows, therefore, that these two systems of law are clearly distinct, and both rights and forms

of procedure—rights recognized and followed under one system—are in many instances not recognized or followed under the other at all.

Twelfth.

A shipowner is not liable in an action at common law for the negligence of a compulsory pilot, and the English statute expressly exempting the shipowner from liability in such cases, is only an affirmation of the rule of common law.

The question as to whether the shipowner is liable for the acts of the pilot under this system of law, depends upon whether or not the pilot is the *servant* of the shipowner.

This is clearly the rule at common law, whatever may be the rule under adjudged cases in proceedings *in rem* in the admiralty; and this being an action at common law, the common law rule must apply.

There is an apparent conflict between some of the authorities as to the question generally; but the cases are easily reconcilable when considered with reference to whether the pilot was *compulsory* or *not* compulsory.

In England since the Act of 52 Geo. III, Ch. 39 (Sec. 30), it is expressly provided by statute that

the shipowner shall not be liable for the negligence of a pilot taken on board in pursuance of or by compulsion of law.

See 52 Geo. III, Ch. 39, Sec. 30;
6 Geo. IV, Ch. 125, Sec. 55;
17 and 18 Vic., Ch. 104, Sec. 388.

But this legislation is only an affirmation of the rule at common law, as will be shown hereafter. In other words, if pilotage be *compulsory*, the shipowner is *not liable even at common law, independently of the statutory exemption.* If, on the other hand, pilotage is left *optional*, the shipowner *is* liable. And the decided cases group themselves into these two classes.

The distinction for which we contend, and the rule at common law, independently of the English Statute, was declared by Dr. Lushington in the case of *Maria*, 1 Wm. Rob., 95, 109.

That distinguished jurist says:

> "If the taking of a pilot on board was *compulsory* and the collision was occasioned by the fault of the pilot, I shall hold the owners *exempt* from responsibility *upon general principle without reference to acts of Parliament*, for in that case *the pilot was not their servant*, and the maxim *qui facit per alium, facit per se* does not apply. *If, on the contrary*, the taking of a pilot is *voluntary*, then he was the servant of the owners, and the owners are responsible," &c.

So also in the case of the *Halley* decided in the English Privy Council in 1868, Lord Justice Selwyn, in delivering the opinion advising Her Majesty, said in reference to *compulsory* pilots:

> "Assuming, as, for the purposes of this appeal their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the *common law* and statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person (a compulsory pilot) who was *in no sense the servant* of the appellants, a person whom they were *compelled* to receive on board their ship, in whose *selection* they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede, and had, in fact, at the time of the collision, superseded the authority of the master appointed by them; and their Lordships think that the maxim *qui facit per alium facit per se* cannot by the law of England be applied as against the appellants under such circumstances; *and that the tort upon which this cause is founded is one which would not be recognized by the law of England as creating any liability in or cause of action against the appellants.*"
>
> The *Halley*, L. R., 2 Priv. C., App. Cas., 193, 202.

Thirteenth.

The distinction rests upon the fundamental doctrine of the common law that, in order to constitute the relation of master and servant, and to found thereon the rule of *respondeat superior*, the servant must not only be *employed* by, but be under the *general control and direction* of the master.

The rule is illustrated in a number of cases.

In the case of Laugher *v.* Pointer, 5 Barnwell & Cresswell, 547, it was held (and the doctrine has since been affirmed in later cases) that the owner of a carriage hiring horses of a stable keeper who sent his own driver, was not liable for an injury done whilst the carriage was so driven.

Laugher *v.* Pointer, 5 B. & C., 547.

In the case of Reedie *v.* North Western Ry. Co., 4 Ex., 244, which was an action to recover damages resulting from the fall of a stone from a railway track in process of construction by a contractor who had full charge of the work, it was held that the railway company was not liable.

The Court (Baron Rolfe) in delivering the opinion in that case, said:

> "In the case of Quarman *v.* Burnett, this Court decided (adopting the opinion of Lord

Tenterden and Mr. Justice Littledale, in Laugher *v.* Pointer), that the liability to make compensation for an injury arising from the neglect of a person driving a carriage, attaches only on the driver, or on the person employing him. The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, '*Qui facit per alium facit per se.*' The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed; but neither the principle of the rule, nor the rule itself, can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned. The doctrine of Quarman *v.* Burnett has since been acted on in this court, in the case of Rapson *v.* Cubitt, and in the Court of Queen's Bench, in Milligan *v.* Wedge, and again in Allen *v.* Hayward."

"By these authorities we must consider the law to have been settled; and the only question is, whether the law, so settled, is applicable to the facts of this case."

Reedie *v.* North Western Ry. Co., 4 Ex., 255.

So also in Milligan *v.* Wedge, 12 A. & E., 737. In that case a butcher who had bought a bullock, employed a licensed drover to drive it home, none but licensed drovers being allowed to drive bullocks. The drover employed a boy to drive the animal, which did damage through the boy's careless driving. Denman, C. J., says:

> "The party sued has not done the act complained of, but has employed another, who is *recognized by the law as exercising a distinct calling*. The butcher was not bound to drive the beast; he might not know how to drive it. He employs a drover, who employs a servant, who does the mischief. The drover therefore is liable, and *not the owner of the beast*. * * * So as to *decisions upon the pilot acts* when it is not *necessary* to employ a pilot, the master who has *voluntarily* employed one is liable for his act."

So Williams, J.:

> "Where the person who does the injury *exercises an independent employment* the party employing him is clearly not liable."

And Coleridge, J.:

> "I make no distinction between the drover and the boy. Suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation,

therefore, of master and servant does not exist between them."

Again, in another case where it appeared that the master and crew of a vessel were bound to obey the directions of a *harbor master* in going into dock, and a collision occurred by the ship being conducted according to harbor master's directions, the ship was held not to be liable.

In delivering his decision in the latter case, Dr. Lushington said:

> "I certainly hold by the judgment I delivered in the case of the *Maria*. I then well considered the point, and under circumstances which made a great impression upon my mind. I had to endeavor to reconcile two apparently conflicting decisions: Carruthers *v.* Sydebotham, in the Queen's Bench, and Attorney-General *v.* Case, in the Exchequer, and I there said that no one should be chargeable with the act of another who is not an agent of his own choice. That principle still appears to me founded in equity, and it applies to the present case with more force than to the case of the *Maria*. A shipowner cannot be responsible for obeying, under compulsion of the statute, the orders of the harbour master, who is a stranger to him. This plea, if established, is a good defense to the action."

The *Bilbao*, Lush., 149, 153.

So, also, "where a ship is being worked by a charterer or hirer who appoints and pays the officers and crew under a charter-party or agreement which amounts to a demise of the vessel, the owner is not liable for damage she may do while in the possession of the charterer. But if the owner remains in possession of the ship, either by himself or his agents, he is liable, though she is under charter to another."

Marsden on Collisions, 3d Ed., pp. 70, 71;
Scott *v.* Scott, 2 Starkie, 438.

Again, in another case, where a vessel was chartered by the public authority as a transport and is engaged in an expedition in which it, in common with others, is subject to general command, her owners were held not liable for damages to another vessel of the same fleet occasioned in consequence of compliance with orders from the commanding authority.

Hodgkinson *v.* Fernie, 2 C. B. (N. S.), 415.

So, also, a steamship company is not liable for the negligence of a physician and surgeon carried on board, whether compelled by law to have such physician or not.

Laubheim *v.* Dek. N. S. Co., 107 N. Y., 228.
O'Brien *v.* Cunard S. S. Co., 28 North Eastern Rep. (Mass.), 266; S. C., 154 Mass., 272.

Fourteenth.

An analysis of the precedents shows that there can be no recovery against a shipowner in case of compulsory pilotage.

The earliest reported case in England was decided by Sir William Scott in the English High Court of Admiralty in 1814. This case has been considered by some judges as an authority against the point for which we contend; but it will be shown that this error has resulted from (1) the fact that the proceeding was a suit *in rem* in the Admiralty, and (2) not keeping in mind the distinction between compulsory pilotage, and pilotage which is not compulsory. The whole report of the case, so far as it relates to this subject, is as follows:

> "It is acknowledged in this case that the damage was done by the ship proceeded against; but it has been set up, in the way of excuse, that she was, at the time, under the care of a regular pilot, and was acting in obedience to his directions; and it has been contended, in the argument, that the pilot alone is answerable for any damage that may have been sustained in consequence of the mismanagement of the vessel. If the position could be maintained, that the *mere fact of having a pilot on board, and acting in obedience to his directions,* would discharge

the owners from responsibility, I am of opinion that they would stand excused in the present case; for I think it is sufficiently established in proof, that the master acted throughout in conformity to the directions of the pilot. But this, I conceive, is not the true rule of law. The parties who suffer are entitled to have their remedy *against the vessel* that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him. It cannot be maintained *that the circumstances of having a pilot on board, and acting in conformity to his direction*, can operate as a discharge of the responsibility of the owner."

The *Neptune the Second*, 1 Dodson, p. 467.

Whilst this case is one in which the shipowner's exemption was denied, it by no means follows (as was thought in some of the cases hereinafter referred to) that the distinguished Judge who decided it was of the opinion that the shipowner was liable in *all* cases for the acts of the pilot and whether compulsory or not, especially as this decision was made subsequently to the enactment of 52 Geo. III, Ch. 39, which took away liability in

the latter case by statute; but, on the contrary, the meagerness of the report leaves it to be inferred that the ship in question was either (1) a foreign vessel and, therefore, not required to take a pilot, as was held in some of the earlier cases; or (2) was not on pilotage ground; or (3) that her situation did not require her to be under the command of a pilot at the time, as for instance if while at anchor she was suffered to drag and foul another vessel; or (4) that the pilot on board was not a compulsory pilot, but the mere employee of the owners.

This is the view of the case of the *Neptune the Second* taken by Dr. Lushington, in the case of the *Eden*, 2 Wm. Rob., 442, where he says:

> "It may be asked, who were the pilots of whom Lord Stowell was speaking? Clearly not the persons of whom, in earlier times, the class of pilots consisted, namely, a body of persons not appropriated to the local navigation of vessels by any competent authority, but *persons promiscuously plying about* in the neighborhood of ports and channels and taken on board by the masters at *their own option* for the purpose of conducting their vessels where a local knowledge and experience was required."
>
> See the *Eden*, 2 Wm. Rob., 442.

The report of the case is, in any event, altogether too much lacking as to the facts to render it an authority of impressive weight; and as it is reconcilable with the decisions holding the shipowner

liable in cases where pilotage is *not* compulsory, it should properly be grouped with that class. At all events, it is not an authority against the rule that the shipowner is not liable when pilotage is *compulsory*, for the existence of the statute expressly declaring the shipowner not liable in such case absolutely negatives such an assumption.

The next case in point of time is that of Attorney-General *v.* Case and others, decided in the Court of Exchequer in 1816 and reported in 3 Price, 302.

In that case the question was whether or not the Local Pilot Act of Liverpool was compulsory and required the master to have a pilot on board whilst lying at anchor, the injury having been done by a vessel anchored in the Mersey and drifting against another. The Court held that the act *did not* oblige the master to have a pilot in *that situation* and held the owners liable, intimating that were it otherwise, the result would have been different.

After examining the Local Pilot Act of Liverpool in connection with the General Pilot Act of 52 Geo. III, the Court, through Chief Baron Thompson, said:

> "There is, therefore, *no obligation imposed* by the 37 Geo. III, upon the master, to take any pilot whatever on board his vessel *before she proceeds on her voyage;* for the consequence of his refusing to take a pilot on board, on other occasions, is only a liability to pay the same wages as if he had taken such pilot on board. Now, if he was proceeding to sea, having taken such pilot

on board; and if, while the ship was duly and properly under the management of that pilot, an accident had happened, it might have been a fair question, whether the owner would then have been answerable; though there have been cases which show, that though a pilot may be on board, the master is in some instances deemed responsible, notwithstanding. But, I repeat, there is no such penal provision in this act of the Liverpool Pilotage. By the 34th section of that act, indeed, it is provided, 'that if the owner, master or commander, shall require the attendance of a licensed pilot on board any ship or vessel during her riding at anchor, or being at Hoylake' (which is lower down than Liverpool), 'or in the river Mersey' (that is, while she is riding at anchor), 'such pilot shall attend such ship or vessel, and be paid for every day he shall so attend, five shillings, and no more.' So that there is nothing here compulsory upon the master or owner to take on board a pilot, *while he is riding at anchor in this river Mersey.* It is *optional* to him whether he will do it or not; but, if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His *obligation* to take a pilot (even if the act of the 37th is to be taken as connected with the act of the 52d of the king), is only on his proceeding to sea, and refusing to take on board

a pilot so licensed. There is no penalty for not taking on board a pilot while lying in the river Mersey; but he is *enabled*, if he thinks fit (and not otherwise), to *command the services of a pilot* while so lying at anchor, paying for him at the rate here specified; and it is for that accommodation that he is *to pay the five shillings*, if he refuses to take the pilot on board. The master of the king's ship states that this vessel was outward bound; she had been lying there a considerable time; she was not, at this time, proceeding on her voyage. The master seems to have made his *election* to have a pilot on board, though she was lying entirely at anchor, and not proceeding upon her voyage. Then, what is there in this case which authorizes the Court to say that the master is not responsible under the circumstances which have been so detailed? He was not compellable at that time, in any way, either under the penalty of double the wages, or of paying even the single wages, to have any pilot on board. It was *his own act* to have him; and it can be only in the case of such an officer having been *forced* upon them, and *without his own election*, that the responsibility of the owner can possibly be discharged."

Attorney-General *v.* Case and others, 3 Price, pp. 321, 322 and 323.

The next case is that of Carruthers *v.* Syde-

botham, decided in the King's Bench in 1815, and reported in 4 Maule & Selwyn, 77.

In that case a ship, being under the conduct of a pilot, was proceeding in her course up the Mersey, and, against the advice of the master, was fastened at the pier of the dock basin by a rope to the shore and left there, in which condition she took ground, careened over, and, when the tide rose, filled with water, in consequence of which her cargo was damaged, and it was held that the underwriters were liable.

The questions were (1) whether this was a *stranding* within the terms of the policy, and (2) whether the accident was to be considered as having happened through the misconduct of the servants of the shipowner, in which case the underwriters would have been discharged.

Lord Ellenborough (whose views were concurred in by LeBlanc and Bayley, JJ.) said:

> "Two questions arise upon this case. First, whether a stranding of the ship has taken place, in which event only the underwriter will be liable for damage to this species of commodity; and in this case the ship has lain on the strand, the commodity has had sea water upon it and has been damaged, which is one of the perils insured against; and all this happened in the course of the voyage. For whether the ship was under the conduct of the pilot or the master, the damage is equally a damage in the course of the voyage, and so within the scope of the

policy. The only remaining question then is, whether that which has happened is to be considered as having happened through the misconduct of the master and mariners, from which the underwriter is exempted. Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must first be shown that there is a *privity* between the pilot and the master, so that the one may be *considered as the representative or agent of the other.* But does the master appoint the pilot? Certainly not. The regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed. But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person, whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them. In general, if there be a damage arising from a marine peril, unless that damage be induced by the act of the master, or mariners, or owner of

> the ship, it is a damage within the scope of the policy. Here has been a stranding which has occasioned an average loss, for which the underwriter will be responsible unless it has been occasioned by the party's own act. And how can that be, unless the act of the pilot who is imposed upon the master by law, is to be considered as his act? It appears to me, therefore, that the underwriter is liable; because this does not fall within the description of a damage that has been caused by the act of the assured themselves, but by the act of the pilot, between whom and the assured there was no privity. The same principle, I think, governed the case of Nicholson *v.* Mounsey (15 East, 384)."

Carruthers *v.* Sydebotham, 4 Maule and Selwyn's Reports, pp. 84, 85, 86.

The opinions of LeBlanc and Bayley, JJ., are principally taken up in determining whether there was a "stranding," and also an examination of the statute to determine whether or not it obliged the master to take and follow the directions of the pilot; but they both concurred with Lord Ellenborough, and Mr. Justice Bayley added.

> "And this being the case where the master of the ship was bound at his peril to take a pilot on board, he cannot be identified with the pilot so as to make the damage that has happened through his neglect a damage occasioned by the neglect of the master or owner."

The next case was Bennett *v.* Moita, decided in the Court of Common Pleas in 1817, and reported in 7 Taunton, 258.

In that case it was held that where a vessel, having on board a compulsory pilot, pursuant to 52 Geo. III, and causing damage in consequence of the neglect of the pilot, the master was not liable, but that *the action must be brought against the pilot.*

The next reported case (Ritchie *v.* Bowfield, 7 Term R., 309) occurred in the same year (1817) as the preceding case, and was decided by the same Court (Common Pleas).

This case was mainly on the construction of the Act of 52 Geo. III, Ch. 39, Sec. 30, and the principal question was whether the words "loss or damage" in that section extended to cases of collision or was confined to loss or damage of the cargo. It was held that it did not extend to cases of collision, and that the owners, having on board a compulsory pilot, as required by Sec. 11 of the Act, were not liable.

Ritchie *v.* Bowfield, 7 Term R., 309.

The law thus rested until the case of the *Christiana*, decided in the High Court of Admiralty in 1828, and reported in 2 Hagg., 183.

In that case it was held that the offending vessel having been in the charge of a pilot as required by law the owners and their bail should be dismissed as not being liable.

The *Christiana*, 2 Hagg., 183.

The question seems not to have again engaged the attention of the Courts until 1834, when Sir John Nicoll passed upon it in the High Court of Admiralty in the case of the *Girolamo*, 3 Hagg., 169.

This case has also been misunderstood and in some instances cited as an authority against the immunity from responsibility for compulsory pilotage. But such was not the decision at all, for it was expressly held, so far as that branch of the case was concerned that the pilot was *not* compulsory.

The facts were that the *Girolamo*, an American vessel, left the London docks with a licensed pilot on board and in tow of a steamer. After passing Blackwall, a fog came on during which she ran foul of another vessel moored a little below Woolwich and in the proper place for vessels. The case was disposed of on the main ground that the accident was due not to the negligence of the pilot, but to that of the master.

On the point as to whether the ship and owners would be liable if the negligence had been that of the pilot, the learned Judge held that they would be liable because the pilot was *not* compulsory.

At the outset of the case the learned Judge said:

> "If either a British or a foreign vessel take a pilot, *when not required by law to do so*, such pilot is the servant of the owner, who is responsible for his acts."

And in another part of the case the learned Judge observed:

"In the first place, it is by no means clear that a foreign ship is *compellable* to take a pilot, for there are no means of compelling a foreign vessel outward bound, and having actually commenced her voyage, to do so. A foreign vessel may indeed be compelled to pay the pilotage, whether she has a pilot on board or not, by the second section; and that clause and some others strongly infer that a pilot ought to be taken on board, not only for the purpose of protecting the foreign vessel herself, but others which may be in her way—British vessels and British property within our own harbors; but if the master should neglect to take a pilot, there are no means of enforcing the penalties against him. If, then, the taking of a pilot on board be considered as the *voluntary act* of the foreign master, the pilot is, *in such case*, the servant of the foreign master and owner, and they must seek their indemnity from him; but it may not be necessary for the Court now to decide this point."

The *Girolamo*, 3 Hagg., 169, 175.

It, therefore, follows that the case of the *Girolamo* is one of the cases in which the owners were held liable, because the pilot was *not* compulsory.

It should be furthermore observed of this case that the decision of Sir John Nicoll that a foreign vessel is not bound to take a pilot was afterwards overruled. See The *Christiana*, 2 Hagg., 185, 189; The *Maria*, 1 Wm. Rob., 95.

Then comes the case of the *Baron Holberg*, decided in the same Court, and by the same Judge (Sir John Nicoll), in 1835.

That case, too, has been thought to be an authority against the immunity of the shipowner from responsibility for the negligence of a compulsory pilot; but this is an absolute mistake. The *Baron Holberg* was a foreign vessel and was held liable, as in the case of the *Girolamo*, on the ground that the statute requiring the master to take a pilot was not obligatory upon foreign vessels. Even counsel in the argument said that "it was not his intention after the decision in the case of the *Girolamo* to argue that the fact of a licensed pilot in charge would relieve the owners of a *foreign* ship from an action *in rem;*" and the learned Judge in his decision does not even mention, much less discuss, the question, but evidently disposes of it upon the assumption that the point was sufficiently decided in the *Girolamo*.

The *Baron Holberg*, 3 Hagg., 244.

The next case in which the subject received consideration arose before Dr. Lushington in 1839 in the case of the *Protector*, reported in 1 Wm. Rob., p. 46.

In that case the eminent Judge took the view contended for in this case and attempted to reconcile the apparent conflict in the preceding decisions.

After reviewing the cases the learned Judge said:

> "Where the appointment rests with the owner himself, as in the case of the master

and crew, it is reasonable that he should be held responsible for their acts who are agents selected by himself; and he is bound to provide persons of adequate skill, diligence and sobriety. But where a person is compulsorily put on board the vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety and caution, of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others; the owner himself being entirely debarred from any possibility of interference. On the words of the statute, therefore, and upon principles of equity and justice, I am bound to hold the owners relieved from all responsibility, where the accident has been occasioned according to the words of the statute, 'from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in charge of the vessel.'"

"In the view which I have thus taken of the question before the Court, I find myself supported by the authority of the cases, the Attorney-General *v.* Case; Mackintosh *v.* Slade; and Carruthers *v.* Sidebottom. These cases have been cited in the arguments of counsel, and they all tend to satisfy my mind

of the correctness of the principle upon which my opinion has been formed."

"In the case of the Attorney-General *v.* Case, reported in the third volume of Price's Reports, upon what ground was the vessel doing the damage, and having a pilot on board, held not to be exempt from responsibility? The ground upon which the owner's exemption was overruled in that case was this, that the pilot was taken on board under a local act, and not under the general act; and that it was optional for the master to take one or not."

"Again, what was the principle laid down by Mr. Justice Bayley in the case of Mackintosh *v.* Slade, reported in the sixth Barnwell and Cresswell? Why, the very principle I have adopted in the present instance; that where an owner is compelled to take a pilot on board, and a damage is occasioned whilst the vessel is under the management of that pilot, the owner is relieved from the responsibility. The words of Mr. Justice Bayley in delivering the judgment in that case were these: 'We are of opinion that the master was bound at the time to have a pilot on board, and consequently that the owners are exempt from responsibility.'"

"Lastly, in the case of Carruthers *v.* Sidebottom, which was tried before Lord Ellenborough, that learned Judge, in delivering his judgment, expresses his opinion in the

following terms: 'Does the master appoint the pilot? Certainly not. The regulation of the General Pilot Act imposes a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed within any limits for which pilots are lawfully appointed, and there is an exception for which pilots are not appointed. But if the master cannot navigate without a pilot, except under penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them.'"

"Thus confirmed in my view of the present question, I am clearly of opinion, that upon this point of law, assuming all the facts to be as I have stated, the having a pilot on board in pursuance of the act will work an exemption from liability where the damage arises from the neglect, default or incompetency of the pilot."

The *Protector*, 1 W. Rob., 55, 56.

The question arose again before the same Judge in a case shortly following in 1839, namely, the case of the *Maria*, 1 Wm. Rob., 95.

In that case it was held, contrary to previous rulings, that the statute requiring licensed pilots

also applied to foreign vessels, and that they and their owners were also exempt from liability where damage was done by the pilot; and the learned Judge again went into a review of the previous decisions in reference to the general liability of shipowners for the acts of compulsory pilots.

After a review of the exemption expressly provided by the British Statute, the learned Judge proceeded to say:

> "*Now I am of opinion that, independently of the express provisions in those statutes, the compulsory taking of a pilot does, upon general principles, relieve the owner from all responsibility for his acts.* Observe the expression of Mr. Justice Le Blanc, 'independently of the general principle, the Pilot Act provides,' &c. Although, therefore, his judgment was founded upon the opinion that the 55th Section did apply to the Liverpool Act in the particular case he was deciding, he clearly recognized the general principle, *and this principle is one that is recognized by common sense and justice all over the world.* Supposing, then, the General Pilot Act not to apply in this case, is not the general principle alone sufficient to exonerate the owners? I think it is, and for this reason; upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another, the

principle upon which liability depends wholly fails."

"These are nearly the words in which Lord Chief Justice Eyre laid down the principle of law respecting the responsibility of owners. If it were necessary to trace the principle further, I might refer to the case of Nicholas *v.* Mounsey, reported in 3 East; but it is not necessary to go into the consideration of that case. I may here, however, notice that it has been said that a contrary doctrine has been laid down by Chief Justice Mansfield, in the case of Nordstrum *v.* Boucher, but on looking to the report, it is evident that the doctrine said to have been delivered by Chief Justice Mansfield applied to a very different case. Then what is the result, upon my mind, of the two important cases to which I have so fully adverted, leaving out of consideration the question of the general operation of the Pilot Act, and its applicability to pilots appointed by local authorities? It is this,—I think both cases were rightly decided,—the case of the Attorney-General *v.* Case, because there was no compulsion to take a pilot; that of Carruthers *v.* Sidebottom, because the taking a pilot was compulsory, and the insurers were only liable upon that ground, and not otherwise. After this long but, as I conceive, necessary preliminary examination of the cases and principles on which they were de-

cided, I now come to the present case, and I shall apply the principles I have laid down to it."

"If the taking of a pilot on board was *compulsory*, and the collision was occasioned by the fault of that pilot, *I shall hold the owners of* The Maria *exempt from responsibility, upon general principle, without reference to acts of Parliament, for in that case the pilot was not their servant*, and the maxim *qui facit per alium facit per se*, does not apply. If, on the contrary, the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible, unless the General Pilot Act, which takes away responsibility, applies to a foreign vessel so circumstanced, and to cases where it is optional to take a pilot or not."

The Maria, 1 W. Rob., 105, 107 and 108.

Another case occurred in 1840, in the English Exchequer, namely, the case of Lucy *v.* Ingram, reported in 6 Mees. & W., 302.

In that case the question was whether the pilot was still compulsory after the vessel had arrived and discharged and was being removed to a dry dock. The Court held that though the pilot was not, strictly speaking, still compulsory, yet, being still on board, the equity of the statutory exemption should be extended to the owners and they were accordingly discharged.

See Lucy *v.* Ingram, 6 Mees. & W., 302.

Dr. Lushington had occasion to consider the question again in 1843 in the case of the *Agricola*, 2 Wm. Rob., 11.

In that case the learned Judge said:

> "I have already in former instances been called upon to consider the construction of the Pilot Acts, and in so doing I had occasion to refer to the previous decisions which had been made with regard to those acts. In referring to those decisions, it was my misfortune to find that the interpretations put upon the statutes had not been uniform or consistent; and in this conflict of authorities in the cases of *The Protector* and *The Maria*, I felt myself bound to form my own opinion, and having bestowed the most anxious consideration upon the subject, to determine the question according to the best of my own judgment. It would not, I think, tend to throw any light upon the present case if I were to repeat the observations which I made in deciding those cases. Thus much, however, I may premise, in approaching the consideration of the question which I have now to determine, namely, that I shall continue to adopt the principles of law which I laid down in the cases of *The Protector* and *The Maria*, until my decision in those cases is overruled by a superior Court, and by those principles I shall be guided in determining the present case, unless any novelty should be found in its circumstances to raise a distinction in its favor." * * *

And further on, after considering the facts, the Judge continued:

> "Being, then, of opinion that the master of *The Agricola* was compelled to take a pilot, I have now to consider how far the owners of this vessel are exonerated from the consequences of such pilot's misconduct. In the investigation of this point in this case I must look to the General Pilot Act, 6 G. IV, cap. 175. The Liverpool Pilot Act contains no express exoneration, and no construction has been put upon that act that, *per se*, it confers upon the owners any exemption from liability. The question then arises, is this responsibility taken away by the General Pilot Act? This question is obviously attended with no little difficulty, and for this reason, namely, that it has already been raised before the Court of King's Bench and the Court of Exchequer, and the judges of those courts entertained very different conclusions with respect to the construction of the act of parliament; the Court of King's Bench holding that the General Act did operate upon the Liverpool Act, the Court of Exchequer as clearly holding that it did not. In determining this question in reference to the present case, I shall adopt the same course which I pursued in the case of *The Maria*, and, without taking upon myself the difficult task of deciding upon the conflicting opinions of such high authorities as

the Court of King's Bench and the Court of Exchequer, I shall be guided by the *general principle upon which my judgment was founded in the case of* The Maria, *namely, that wherever a man is compelled by the law to employ a particular individual in the performance of a given service, the law (which imposes the obligation upon him) must take away his responsibility for the acts of that individual whom he is so compelled to employ.* Applying this principle to the circumstances of the case before me, I am of opinion that the defense of the owners of *The Agricola* is a valid defense, and that they have established their exemption from the responsibility of this collision."

Then the same Judge discussed the case in another aspect, namely, whether the owners would have been liable even though they were *not compelled* to take the pilot, but had one pursuant to law.

On this subject the Judge said:

"Before I close my observations upon this case I will shortly advert to an argument which has been urged by the counsel for the owners of *The Agricola*, that even if the taking a pilot on board was *not* compulsory, yet, if a pilot should be taken in pursuance of the provisions of an act of parliament, the liability of the owners, upon general principle, is thereby discharged. In support of this

position the Court was referred to the decision in the case of Lucy *v.* Ingram. Reference was also made to the case of Milligan *v.* Wedge, reported in the twelfth volume of Adolphus & Ellis' Reports. Now in the case of Lucy *v.* Ingram, a pilot was taken voluntarily by the master of a vessel, and as such pilot was taken under the provisions of the statute, he being compellable to go on board if required, and the 55th section of the act having directed that no person shall be responsible for the acts of a pilot taken on board under the provisions of the statute, the Court of Exchequer was of opinion, that, although the master was not compelled to take the pilot, yet, being taken by virtue of the statutory enactment, the owners were not responsible for the acts of such pilot. The case, therefore, of Lucy *v.* Ingram is clearly distinguishable from the case suggested, and I am not prepared to extend the principle upon which that case was decided to the case of a pilot voluntarily taken on board, under the provisions of the Liverpool Pilot Act, unless the act of 6 G. IV applies to that act. Assuming that it does not apply, I am not prepared to say that, if the pilot had been voluntarily taken on board this vessel, the owners would not be responsible for the acts of that pilot. If the doctrine contended for be true, that the responsibility would not attach upon general principle, the

discussions in the Court of King's Bench and Exchequer would have been unnecessary; and looking to the persons by whom the question was argued and determined in those courts—the chief, Baron Thompson, being one of the judges, than whom a more careful judge never sat upon the bench—I cannot but think that if such an argument would have been held good, it would have been noticed in the argument of counsel, or adverted to in the judgment of the Court."

"With respect to the case of Milligan *v.* Wedge, I do not think that case will bear out the proposition in support of which it has been cited."

"In that case, the purchaser of a bullock employed a licensed drover to drive it from Smithfield to the butcher's shop. The drover employed a boy, and mischief was occasioned through the careless driving of the boy so employed. The Court held that the purchaser was not liable for the damage, and for this reason, namely, that by the by-laws of London he was compelled to employ the licensed drover in the first instance; he had, therefore, no choice as to whom he should employ. Between that case, therefore, and the present case there is this distinction, that in the present case the owners of *The Agricola* might, by law, have employed their own master in navigating their vessel, subject to the penalties to which I

have already adverted. In the case of Milligan *v.* Wedge the purchaser was, *ex necessitate*, compelled to employ the licensed drover. The principle, therefore, upon which that case was determined does not apply in the present case. In deciding the present question my judgment is founded *solely upon the principle* which I laid down in the case of *The Maria*, namely, that the master of *The Agricola* was *bound* to take the pilot on board, and the collision having been occasioned entirely by the misconduct of that *pilot*, the owners of *The Agricola cannot be made responsible*. I therefore dismiss them from this suit."

The Agricola, 2 Wm. Rob., 20 and 21.

So, too, in the case of *The Eden*, 2 Wm. Rob., 442, Dr. Lushington held that the shipowner was liable because the pilot was not taken by compulsion.

In the beginning of his opinion, however, the learned Judge re-affirmed his previous decisions and made the following observations, especially in regard to the decision of Lord Stowell in the case of the *Neptune the Second* (*supra*):

"When the Court pronounced its judgment in this case, that *The Eden* was to blame, and that no misconduct was imputable to *The Welcome Return*, a question was reserved for further consideration—how far the owners of *The Eden* were relieved from

responsibility under the provisions of the Pilot Act, the collision having occurred in the harbor of Cork, and *The Eden* being at the time in charge of a pilot duly licensed to act as pilot in that locality. This question I have now to determine; and looking to the difficulties which have heretofore been experienced, and to the conflicting decisions which have been delivered in other Courts, I am glad that I have taken time to deliberate upon the subject, although perhaps my own original impression has not been changed by the arguments which have been urged in the present instance. It is not unimportant to the consideration in question to bear in mind the view which Lord Stowell entertained in the case of *The Neptune the Second*, a case which is reported in the first volume of Dodson's Reports, page 467. The decision in that case was wholly independent of any reference to legislative enactments. From my own recollection of that case I am satisfied that no allusion was made to any Act of Parliament, and in delivering his judgment, Lord Stowell declared in most explicit terms, that the owners of vessels were responsible to the injured parties for the misconduct of pilots taken on board. It may be asked who were the pilots of whom Lord Stowell was speaking? Clearly not the persons of whom in earlier times the class of pilots consisted, namely, a body of

persons not appropriated to the local navigation of vessels by any competent authority, but persons promiscuously plying about in the neighborhood of ports and channels and taken on board by the masters at *their own option*, for the purpose of conducting their vessels where a local knowledge and experience was required. Long previous to the time when Lord Stowell delivered his judgment in *The Neptune the Second* pilots had been incorporated by charter, and their duties and privileges regulated by Acts of Parliament. As early as the reign of George the First there were statutes for the regulation of pilots, relating more especially to those who navigate on the river Thames. These Acts of Parliament, it must be assumed, were not unknown to the very learned judge who decided the case of *The Neptune the Second;* and in his decision in that case Lord Stowell must be understood to assert, that by the common law of the Court of Admiralty, independent of all statutory enactments, the having on board a pilot duly licensed and authorized to act as pilot, did not exempt the owners from a responsibility for the acts of that pilot."

"The opinion thus expressed by that very eminent Judge was not only his own individual opinion, but was obviously the received opinion of this Court from the earliest periods; for surely it is not assuming too

much to say, that, if the fact had been otherwise, cases would have occurred and decisions would have been found where the contrary doctrine had been established, namely, that the owners were exempt from responsibility upon the mere fact that a licensed pilot was on board. Without referring to other authorities in this Court upon the point, I may here observe, that the same opinion has been entertained at least once in the courts of common law, in the case of the Attorney-General *v.* Case, where the Court of Exchequer held that the owners of the vessel were liable, although the vessel was in charge of a duly licensed pilot. The judgment in that case rested upon the assumption that the pilot was taken on board *not* by compulsion but *voluntarily*, and, as far as I am informed, the same principle has been adopted in all cases where the taking the pilot was *not* compulsory, or where the liability was not taken away by act of parliament, as in the case of Lucy *v.* Ingram."

The *Eden*, 2 W. Rob., 444 and 445.

The next case arose in the Privy Council before Lord Chemsford, Lord Kingsdown, and the Right Hon. Sir Edward Ryan, in July, 1860. This was the case of the *Peerless*, reported in Lushington, p. 103.

The Court found as a fact in that case that the pilot was *not* compulsory, and therefore held the

owners liable, declining to discuss the general principles on which the right of exemption is founded.

The *Peerless*, 1 Lush., 103.

After that Dr. Lushington had the question again before him, namely, in the case of the *Bilbao*, Lush., 149, in which he said:

> "I certainly hold by the judgment I delivered in the case of the *Maria*. I then well considered the point, and under circumstances which made a great impression upon my mind. I had to endeavor to reconcile two apparent conflicting decisions; Carruthers *v.* Sydebotham, in the Queen's Bench; and Attorney-General *v.* Case, in the Exchequer, and I there said that no one should be chargeable with the act of another who is not an agent of his own choice. That principle still appears to me founded in equity, and it applies to the present case with more force than to the case of the *Maria*. A shipowner cannot be responsible for obeying, under compulsion of the statute, the orders of the harbor master, who is a stranger to him. This plea, if established, is a good defence to the action."

The *Bilbao*, Lush., 153, 154.

Then came the case of the *Annapolis* and the *Johanna Stoll*, Lush., 295.

In that case the question was whether a foreign vessel was subject to compulsory pilotage, and, if

so, entitled to exemption from responsibility for the pilot's negligence.

Dr. Lushington held that a foreign vessel was subject to compulsory pilotage, and that the owners were exempt, saying:

> "But whether the Merchant Shipping Act applies to this case or not, I am of opinion that the owners of the *Annapolis* are exempt from responsibility by reason that the employment of the pilot was compulsory; the pilot was not their servant or agent; they could not avoid intrusting him with the management of the vessel. In the case of the *Maria*, I have stated at some length my reasons for coming to this conclusion. I believe that the doctrine I then maintained, and now adhere to, is consonant with justice, supported by authority, and is in strict accordance with the principle adopted by the Legislature in the Merchant Shipping Act. I, therefore, pronounce against the claim brought by the owners of the *Johanna Stoll*."

The *Annapolis* and the *Johanna Stoll*, Lush., 312.

The question seems to have rested in the English Admiralty until after the death of Dr. Lushington and the accession of Sir. Robert Phillimore as Judge of the High Court of Admiralty, when in 1867 that learned Judge had before him the case of the *Halley*, reported in L. R., 2 Adm. and Ecc., 3.

In the course of his decision Sir Robert Philli-

more questions the expediency of the law of compulsory pilotage, so far as it exempts the owner of the wrongdoing vessel from all liability; but his judgment was reversed in the Privy Counsel in the same case, reported in L. R., 2 P. C. App. Cas., 193. Lord Justice Selwyn, delivering the opinion, among other things, said:

> "Assuming, as for the purposes of this appeal their Lordships are bound to assume, the truth of the facts stated in the pleadings, and applying the principles of the Common law and Statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskillfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede and had, in fact, at the time of the collision, superseded the authority of the Master appointed by them; and their Lordships think that the maxim, '*qui facit per alium facit per se*,' cannot by the law of England be applied as against the appellants, to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognized by the

law of England as creating any liability in, or cause of action against, the appellants."

The *Halley*, L. R., 2 P. C. App. Cas., 202.

A further question in that case was whether in an action by the owners of a foreign vessel against a British steamer for a collision in the waters of a country to which neither vessel belonged, and whose law did not exempt the shipowner for negligence of a compulsory pilot would be enforced in a suit in England, and the Privy Council held that it could not apply the foreign law and decided that the shipowner was not liable.

This review, so far as we are aware, presents all the English cases in which the question has distinctly arisen.

Fifteenth.

The American decisions are in entire harmony with the English cases upon the question presented here.

The cases in this country do not at all conflict with the English decisions upon the point raised in this case, when considered with reference to the distinction sought to be kept in mind in this brief, that is to say, when considered with reference to the question as to whether pilotage is *compulsory* or *not* compulsory.

The American cases are: Bussey *v.* Donaldson, 4 Dallas, 206, decided in the Supreme Court of Pennsylvania in 1809; Williamson *v.* Price, decided in the Supreme Court of Louisiana in 1826, and reported in 4 Martin's Reports, 399; Smith *v.* the *Creole* and the *Samson*, reported in 2 Wall., Jr., 485, and decided in the Circuit Court of the United States for the District of Pennsylvania in 1853; the *Lotty* Olcott, 329; *The Carolus*, 2 Curtis, 69; *The Marcellus*, 1 Cliff, 481; Yates *v.* Brown, decided by the Supreme Court of Massachusetts in 1828, and reported in 8 Pick. 23; Dennison *v.* Seymour, 9 Wend., 9; *The China*, 7 Wall., 53; *The Merrimac*, 14 Wall., 199; Atlee *v.* N. W. Packet Co., 21 Wall., 329; Sherlock *v.* Alling, 93 U. S., 99; and the *E. M. Norton*, 15 Fed. R., 386.

Before going into an extended analysis of these cases, it may be observed that in not one of them, except in the case of *The China*, was pilotage decided to be *compulsory*, and they all rested upon the principle and the fact (either expressly found or assumed) that the pilotage *not being compulsory*, the owners were liable for the acts of the pilot.

In the Circuit Courts in Massachusetts, as well as Pennsylvania (see the *Creole*, *supra*) it has been expressly held that the pilotage acts of those States, respectively, are *not compulsory*.

The Creole, 2 Wall., Jr., 485;
The *Marcellus*, 1 Cliff., 490.

And this Court, in the case of *The Merrimac*, 14

Wall., 199, held that the pilot act of Louisiana was not compulsory.

See also the *Carolus*, 2 Curtis, 69, where it is said that if the pilotage were *compulsory*, it would be *unjust to hold the shipowner*.

The *Carolus*, 2 Curtis, 69.

The earliest reported case in America is that of Bussy *v.* Donaldson, 4 Dall., 206, decided at *nisi prius* in the Supreme Court of Pennsylvania in 1800. In that case the important fact that the negligence was due *solely* to the pilot is wholly lacking. The plea was simply that the ship was *in charge of* a public pilot. This entirely destroys the application of the case to the one now under consideration; for even if the vessel was in charge of a compulsory pilot the negligence must be *solely* the negligence of the pilot, as found in the present case, in order to exempt the shipowner. The *Mobile*, Swabey Ad., 127; the *Diana*, 1 W. Rob., 132; S. C., 4 Moore, P. C., 11; Camp *v.* the *Marcellus*, 1 Clifford, 481. There was no pretence whatever that the pilot was *compulsory*. He was merely described as "a *public* pilot of the port;" and in the subsequent case of Smith *v. The Creole*, 2 Wall., Jr., 485, it was expressly decided in the United States Circuit Court that the Pennsylvania statute under which Bussy *v.* Donaldson was ruled was *not compulsory*. Furthermore, Bussy *v.* Donaldson was decided in the hurry of a jury trial, presumably without an exhaustive examination of the question, and certainly upon a meagre reference to the

authorities; and the case appears never to have been considered on a motion for a new trial, or by an appellate court. Its value, therefore, as an authority on a critical examination of the question is, therefore, of very little, if any, weight.

The next American case in point of time was Williamson *v.* Price, decided in the Supreme Court of Louisiana in 1826, and reported in 15 Martin, 399. In that case also it does not appear that the fault was exclusively the pilot's. The plea was that the vessel was "under the care and consequently under the control of a licensed pilot." There was also no finding that the pilot was *compulsory*. The defendant's plea was, as before stated, that their vessel was "under the care, consequently under the control of a *licensed* pilot," and there is not a syllable in the case to show that the Court considered the Louisiana Act as compulsory. The decision was, furthermore, based principally upon the authority of Bussy *v.* Donaldson, and the English case of the *Neptune*, the latter of which, as we have before shown, was subsequently overruled in England. It is true that the learned Judge said that "It seems hard, on the one side, that while necessity, and in *many places* the law, compel to place a vessel under the absolute command of a pilot," etc.; but this is not a finding that the Louisiana Act was compulsory; and this Court, in the case of the *Merrimac*, 14 Wall., 199, decided, as above stated, that the Louisiana Act was *not compulsory*. The Court also rests its decision partly upon the ground that

the pilot would be very seldom able to respond in damages—the unreasonable and exploded doctrine of *ab inconveniente*—which in New York can have no foundation, because the pilots are a chartered body, owning valuable vessels, and, therefore, furnishing ample means to which an injured party may resort. The legal effect of the case of Williamson *v.* Price, as well as Bussy *v.* Donaldson, therefore, is that the fact that a vessel is in *charge* of a *licensed* pilot does not exempt the owner.

The next case was Yates *v.* Brown, decided by the Supreme Court of Massachusetts in 1823, and reported in 8 Pickering, 23. In that case also *it does not appear that the fault was due to the pilot.* The report shows merely that a pilot was "*on board*," and that when the accident happened the vessel was "*under his charge.*" Furthermore, the report shows that the pilot was "*selected*" by the shipowner. Again the Court did not find that the Massachusetts law was *compulsory;* and in the case of the *Marcellus* (1 Clifford, 481) it was decided that the Massachusetts Act was *not compulsory.*

Denison *v.* Seymour, 9 Wend., 9, decided by the Supreme Court of New York in 1830, and cited by the counsel for the plaintiff in error was not a case of pilotage at all. It, therefore, has no application.

The next case in point of time was *Smith* v. *The Creole,* 2 Wall., Jr., 485. That was a libel *in rem,* and it is not contended in the present case that in suits *in rem* in the admiralty the ship is not liable.

The general discussion of the liability of the ship-owner *in personam* in the case of Smith *v. The Creole*, although interesting and instructive, and entitled to high respect, is, therefore, not an authority, but purely *obiter dicta*.

The same remarks are also applicable to the case of the *Lotty*, Olcott, 329, which, being a suit *in rem*, renders the general remarks of the Judge merely *obiter*. It was furthermore found that the fault was really the master's.

The next case is the *Carolus*, 2 Curtis, 69, decided by the U. S. Circuit Court for Massachusetts in 1854. In that case Judge Curtis held that "for a collision occasioned by the misconduct of a pilot, *employed by the owner not under any compulsion of Statute*, the *vessel* is liable." This was a suit *in rem*, and the learned Judge there makes the distinction we insist upon in this case, viz.: between *a compulsory* pilot and one *not compulsory*. He says: "*If the pilot of the ship had not been employed by the owner*, but had been received by the master, *in obedience to a requisition of law*, enforced by a penalty, then under the authority of Caruthers *v.* Sidebottom, 4 M. & S., 77, and the *Maria*, 1 Wm. Rob., 95, the *Agricola*, 2 *ib.*, 10, *the owners would seem not to be liable for the misconduct or misman agement of the pilot.*"

The counsel for the plaintiff in error cite in their brief *The Eliza* v. *The Decatur*, 2 Whart. Dig., 685. But it is apparent that case was a suit *in rem*, and the citation, therefore, has no authority. Moreover, the passage in Wharton's Digest is to the

effect that the mere fact that the vessel was "*in charge of a licensed pilot*," does not exempt the shipowner. As before seen, in discussing Bussy *v.* Donaldson, we do not dispute this.

The case of *The China*, 7 Wall., 53, has already been discussed. That was a case *in rem*, and therefore the remark in the opinion that the liability would be the same *in personam*, was purely *obiter*. Furthermore, the two English cases upon which the opinion in this respect mainly rested are no longer authority, one (*The Druid*) having been modified, and the other (*The Halley*) having been reversed.

The case of the *Merrimac*, 14 Wall., 199, was also a suit *in rem*. And this Court expressly found that the act providing for the pilot in that case was *not compulsory*. The Court, furthermore, emphasized the point we make here by saying: "Where the law is not enforced by any penalty it is not regarded as compulsory, and *if not compulsory* the defence that the ship was in charge of a pilot is not a valid defence," thus clearly intimating that the rule is otherwise if the pilot is *compulsory*.

In Atlee *v.* The Northwestern Union Packet Company, 21 Wall., 389, it does not even appear that the pilot was a licensed pilot, much less a compulsory one. He was, doubtless, one of what are known as "river pilots," selected and employed by the steamboat owner and engaged continuously. Of course such a pilot is the shipowner's servant.

In Sherlock *v.* Alling, 3 Otto., 99 (93 U. S.), the liability was upheld because the Court found that the Act of Congress in that case *expressly imposed it.* The counsel for the plaintiff in error complains that the referee "overlooked" this case, which we think an unfair charge, in respect to a case so obviously inapplicable.

The case of *The E. M. Norton*, 15 Fed. R., 686, was also a suit *in rem.* It also arose under the Louisiana statute which, as before seen, does not provide for compulsory pilotage. This case, therefore, is not applicable.

This, we believe, covers every case decided in America.

The foregoing review of the American decisions shows that, so far as the question involved in this case is concerned, they are in entire accord with the English cases.

And the distinctions pointed out between them and the present case show these results:

1. That Bussy *v.* Donaldson (4 Dall., 206), Williamson *v.* Price (15 Martin, 399), Yates *v.* Brown (8 Pick, 23), and Sherlock *v.* Alling (93 U. S., 99), the principal cases relied on by the plaintiff in error, (and the only decisions where suits were brought against the shipowner directly,) were cases where the pilots were licensed under statutes expressly declared to be *not compulsory;*

2. That in none of the American cases does the fault appear to have been the pilot's negligence exclusively;

3. That the dictum in the case of *The China* to the effect that the rule as to liability must be the

same *in personam* as in cases *in rem*, so far as the same rests upon the English cases, was based upon decisions since modified or reversed; and this dictum is now eliminated by the definition and scope of the case of the *China* as declared by this Court in the case of Ralli *v.* Troop, 157 U. S., 386 (*supra*); and

4. That all the other cases were suits *in rem*, where liability is not denied in this case, except Atlee *v.* Nor. Packet Co. (21 Wall., 389), where there was no suggestion that the pilot was compulsory or that he was any other than the chosen servant of the shipowner, and Sherlock *v.* Alling (3 Otto., 99, *supra*), which depended upon an Act of Congress expressly declaring the shipowner liable.

There is, therefore, not a single American case against the proposition set up in defense to this action. On the contrary, all the English cases and most of the American decisions either expressly, or by necessary implication, support it.

Sixteenth.

Aside from the fact that the American and English cases are in perfect harmony with each other on the question presented in this case, it is to be noted that a number of the English cases which were the basis *of dicta* in some of the American de-

cisions apparently against the contention of the defendant in error, have been overruled or reversed.

The learned referee in his opinion in this case (Record, fol. 27), among other things, says:

> "In England it is settled, after a good deal of discussion, that, independently of the statutes regulating the pilotage, and which exempt the owner from liability, the owner of a vessel cannot be held at common law personally liable for the negligence of a pilot whom the vessel is compelled to employ, for the reason that the ground of the liability of the owner for the negligence of those who navigate the vessel is based upon the relation between the owner and the parties guilty of negligence, of master and servant or principal and agent, and that as no such relation exists between the owner and the pilot who is imposed upon him by the superior authority of the State, the reason for the liability in case of a master or crew appointed by the owner ceases."

In another part of his opinion (Record, fol. 29) the learned referee again says:

> "In this country the question of the liability of the owner of a ship for the act of a compulsory pilot has received considerable discussion, but there appear to be only two cases in which the point has been directly de-

cided that the owner is liable *in personam* in such case. These are the cases of Bussy *v.* Donaldson, 4 Dall., 206, by the Supreme Court of Pennsylvania, decided in 1800, and Williamson *v.* Price, 4 Martin (N. S.), 399, decided in 1826 by the Supreme Court of Louisiana. There are *dicta*, however, to the same effect in other cases in this country, and especially in the case of the *China*, *supra*, where Mr. Justice Swayne, delivering the opinion of the Court, disapproves of the rule of the English cases, and cites with approval the case of Bussy *v.* Donaldson. The case of the *China*, however, was the case of a proceeding *in rem* against the vessel for damages from a collision caused by the fault of the pilot, and the decision stands upon a ground wholly independent of the personal liability of the owners."

It is thought that the learned referee might have attributed even less authority to the cases of Bussy *v.* Donaldson and Williamson *v.* Price, for in neither of those cases was pilotage found to be compulsory. Indeed, so far as the Pennsylvania statute is concerned, in the subsequent case of Smith *v.* the *Creole*, it was expressly held *not* to be compulsory (2 Wall., Jr., 485); and this Court, in the case of the *Merrimac* (14 Wall., 199), decided that the Louisiana Act was not compulsory.

Furthermore, the case of Williamson *v.* Price was decided partly upon the authority of the *Neptune the Second* (1 Dodson, 467), which was over-

ruled in England in the subsequent case of the *Eden* (2 W. Rob., 444, 445).

And in England, before the rule was established in favor of the exemption of the shipowner from liability for the negligence of a compulsory pilot, many of the cases were based upon the decision in the case of Attorney-General *v.* Case (3 Price, 302), the doctrine of which has been since overruled by the subsequent cases of General Steam Navigation Company *v.* British and Colonial Steam Navigation Company (L. R. 3 Ex., 330; S. C., affirmed L. R. 4 Ex. 238); and the *Charlton* (8 Asp. Mar. L. Cas., 29). So also, as we shall presently see, a dictum in the case of the *China* (7 Wall., 53), resting upon the case of the *Druid* (1 Wm. Rob., 399), loses all its value from the fact that the case of the *Druid* was afterward modified in England in the case of the *Bold Buccleugh* (3 Wm. Rob., 220). Again, in several of the American cases, the case of the *Halley* (L. R., 2 Ad. and Ecc., 3) is cited as an authority against the immunity of the shipowner in case of compulsory pilotage, notably in the cases of the *China* and the *Merrimac* (*supra*); but the case of the *Halley* was reversed in the Privy Council on appeal (L. R. App. Cas., 193). And Attorney-General *v.* Case, which, as before observed, has been overruled in England, was also cited in the cases of Williamson *v.* Price (4 Martin, *supra*) and Yates *v.* Brown (8 Pick., 23). In neither of these cases was pilotage found to be compulsory. As before observed, the Louisiana and Massachusetts statutes have been construed as *not* imposing com-

pulsory pilotage (the *Merrimac*, 14 Wall., 199, and the *Marcellus*, 1 Cliff., 495).

Seventeenth.

The dictum in the case of the *China* to the effect that the shipowner would also be liable *in personam* rested upon cases since overruled or reversed.

The case of *The China*, 7 Wall., 53, having been a proceeding *in rem* need not be discussed at length. There is a dictum in that case, however, to the effect that the same rule would obtain in actions *in personam;* but it is perfectly apparent that the learned Justice who delivered the opinion in that case, overlooked the distinction which we have pointed out, for though the New York Statute was found compulsory, yet without noticing the distinction in the precedents, the rule was referred to which the authorities held applicable only in cases where pilotage was adjudged *not compulsory.*

The dictum in the case of *The China* to the effect that the rule must be the same in actions *in personam* seems, furthermore, to rest upon the case of the *Druid*, 1 Wm. Rob., 399; but the rule stated in the case of the *Druid* was afterwards modified in the case of the *Bold Buccleugh*, 3 Wm. Rob., 220.

This Court, it will be observed, too, place

great stress in the case of *The China* on the judgment of Sir Robert Phillimore in the case of *The Halley* (L. R., 2 Ad. & Ecc., 3) and adopts his reasoning against the other cases considered; but the case of the *Halley* was afterwards reversed in the Privy Council, as we have before shown, and the principle for which we contend again affirmed (See L. R., 2 P. C. App. Cas., 193).

Furthermore, as will be seen from the extracts from the case of Ralli *v.* Troop, 157 U. S., 386 (*supra*) printed as part of the Ninth Point of this brief, the dictum in the *China* case referred to is now eliminated by the express declaration of this Court that the rule there laid down was limited to suits *in rem*, and that the rule at common law is different.

This dictum in the decision of *The China* is, therefore, of no authority whatever, and is for that reason to be treated as one of those general expressions which this Court itself has declared it will not be bound by.

See Cross *v.* Burke, 146 U. S., 87.

Eighteenth.

The authoritative text writers in this country uphold the doctrine that the ship owner is not liable in an action at common law for the negligence of a compulsory pilot.

The American text writers of authority who have

treated the subject of the liability of a ship owner for the negligence of a pilot are in entire accord with the cases which hold that the ship owner is not liable in cases of compulsory pilotage.

Mr. Justice Story, in his work on Agency (Section 456a), says:

> "From what has been already stated, the master of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot, employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another ship, occasioned by his negligence. And it will make no difference in the case, that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for, in such a case, the master acts voluntarily, although he is necessarily required to select from a particular class. On the other hand, if it is compulsive upon the master to take a pilot, and *a fortiori*, if he is bound to do so under a penalty, then, and in such case, neither he, nor the owner, will be liable for injuries occasioned by the negligence of the pilot; for, in such a case, the pilot cannot be deemed properly the servant of the master or the owner, but is forced upon them; and the maxim, *Qui facit per alium facit per se*, does not apply."
>
> (Story on Agency, Sec. 456a).

Mr. Curtis, in his work on Merchant Seamen, (Boston, 1841), thus expounds the rule:

"The liability of the owners for the presumed trespasses of the master, is most frequently availed of by the injured party in cases of collision. The master being at all times the responsible agent of the owners, it is a general principle of law, that the owner's liability is not varied by the fact of the presence of a pilot, in whose control the actual navigation of the ship is for the time being; provided the master is not by statute compelled under a penalty to take a pilot on board. In such case, the taking the pilot is a voluntary act, and he becomes the servant of the owner. But if the master is by statute compelled to take a pilot, the owners are not responsible for his acts while the vessel is under his control. The reason of the distinction is this. The owner is responsible for the acts of the master and crew, because they are his agents, selected and appointed by him, and he is bound to provide persons of adequate skill, diligence, industry and sobriety, for the proper management of the vessel. For the same reason he is responsible for the acts of any person to whom the master voluntarily entrusts the navigation of the ship. But if the owner's authority is superseded by legislative authority, and a person is put on board whose qualifications the owner does not decide upon, but whose

qualifications are determined by others, it is only conformable to a principle of natural justice to hold the owner exempted from responsibility for the acts of such person."

(Curtis on Merchant Seamen, Boston, 1841, pp. 195, 196, 197.)

Nineteenth.

There is neither principle nor authority of law, nor is there any fair and equitable consideration upon which liability should be imposed upon the shipowner in this case.

A remarkable fact transpired at the trial of this case, and is referred to in the opinion of the referee (fol. 22 of the Record), and that was that the master of the *Bretagne* warned the pilot of the danger of collision after it was observed that the ship had ceased to turn down the river, but the pilot thought that she had still room to turn and avoid the collision, and for that reason he did not heed the master's suggestion that the ship should slow or stop, but went on, on his own responsibility, until it was too late to avoid the accident.

In other words, the only agent or servant of the shipowner in this case selected and put in command of this vessel showed a higher degree of prudence and caution—(a prudence and caution that would have avoided the collision)—than the pilot who had been forced upon the shipowner by compulsion of law.

Certainly, in a case like this, there is no equitable reason why the shipowner, through whose agents every measure of precaution was taken, should bear this loss.

On the contrary, not only because the rules of law afford no redress against the shipowner in this case, as abundantly appears from an examination of the authorities already considered, but also because it would be unjust in the extreme to allow the plaintiff in this case any recourse or remedy against anyone other than this incompetent and headstrong pilot, or the association to which he belongs, there should be no recovery in this action.

And, it is respectfully submitted, that the time has long gone by when the argument of convenience, resting upon the supposed inability of the pilot to respond in damages, should be applied. That argument is an illogical and unjust one at best, and in recent years, especially in large ports like that of New York, where pilots are banded together under a strong corporate organization and abundantly responsible and able to answer in damages, it should have no countenance whatever.

Lastly.

This Court should, for the foregoing reasons, direct the return of the first question certified as not being properly before the Circuit Court of Appeals, or that it should be answered in the affirmative, and as to the second question the answer should be in the negative.

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